

United States
Circuit Court of Appeals
For the Ninth Circuit.

WESTERN UNDERWRITING & MORTGAGE
COMPANY, a Corporation,

Appellant,

vs.

THE VALLEY BANK OF PHOENIX, a Corpora-
tion, and THE UNION BANK & TRUST
COMPANY, a Corporation,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the District
of Arizona.

Filed

JAN 20 1916

F. D. Monckton,
Clerk.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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	Page
Answer of Valley Bank of Phoenix to Amended Complaint	62
Assignment of Errors.....	109
Bond	101
Certificate of Clerk U. S. District Court to Tran- script of Record.....	105
Citation	107
Complaint	1
Evidence, Testimony.....	121
EXHIBITS:	
Exhibit "A" to Complaint—Agreement...	25
Exhibit No. 1 to Complaint—Contract and Agreement	31
Exhibit No. 2 to Complaint—List of Assets.	35
Exhibit No. 3 to Complaint—Bonds.....	38
Exhibit No. 4 to Complaint—Quit Claim Deed	38
Exhibit No. 5 to Complaint—Assignment and Transfer	41
Exhibit No. 6 to Complaint—Bill of Sale..	43
Exhibit No. 7 to Complaint—Schedule of Furniture and Fixtures.....	45
Exhibit No. 8 to Complaint—Assignment	46
Exhibit No. 9 to Complaint—Assignment..	49
Exhibit No. 10 to Complaint—Receipt.....	52

Index.	Page
Judgment	86
Minutes, January 22, 1915, Trial, Resumed.....	60
Minutes, April 13, 1915, Re Denial of Motion to Strike	85
Minutes April 14, 1915, Re Hearing.....	83
Motion to Strike	79
Notice of Motion to Strike.....	81
Order Continuing Case Until April Term.....	60
Order Denying Motion to Strike, etc.....	85
Order Dismissing Case, etc.....	84
Order Granting Motion to Vacate Notice of Ap- peal	88
Order Granting Petition and Allowing Appeal.	90
Order Permitting Plaintiff to Amend Complaint	60
Petition for Appeal from the Order Dated April 14th, 1915, in the District Court of the United States, for the District of Arizona.	89
Praecipe for Transcript of Record.....	99
Subpoena Ad Respondendum.....	54
Stipulation as to Abstract of Evidence.....	91
Stipulation of Facts.....	57
 TESTIMONY ON BEHALF OF COMPLAIN- ANT:	
HENNING, E. J.....	147
JENCKES, JOSEPH S.....	141
SMITH, G. C.....	135
Cross-examination by Mr. Ainsworth.	139
STEWART SIDNEY, H.....	122
United States Marshal's Return.....	55

*In the District Court of the United States, in and
for the District of the State of Arizona.*

No. E. 20—In EQUITY.

WESTERN UNDERWRITING & MORTGAGE
COMPANY, a Corporation Organized and
Existing Under the Laws of the State of Cali-
fornia,

Complainant,

vs.

THE VALLEY BANK OF PHOENIX, a Corpora-
tion, and THE UNION BANK & TRUST
COMPANY, a Corporation, Both Organized,
Existing and Doing Business Under the Laws
of the State of Arizona,

Defendants.

Complaint.

To the Judge of the District Court of the United
States for the District of the State of Arizona:

Your orator, the Western Underwriting & Mort-
gage Company, a corporation duly organized, incor-
porated and existing under the laws of the State of
California, and a citizen of said State, brings this, its
bill of complaint on its behalf and on behalf of all
other stockholders of the Union Bank and Trust
Company, who may elect to intervene and join in this
suit, and for the benefit and in behalf of all stockhold-
ers of said corporation, against The Valley Bank of
Phoenix, a corporation organized, existing and en-
gaged in business under and by virtue of the laws of
the State of Arizona, and The Union Bank & Trust

Company, a corporation likewise organized and existing and engaged in business under the laws of the State of Arizona, and thereupon your orator alleges:
[1*]

I.

That your orator, the Western Underwriting & Mortgage Company, is a corporation duly organized and existing under and by virtue of the laws of the State of California, and is a citizen and resident of said State, having its principal place of business at the city of San Diego, and by its charter duly authorized to purchase, own, hold and vote stock in other corporations.

II.

That defendants, The Valley Bank of Phoenix, and The Union Bank & Trust Company, are each corporations organized, existing and engaged in business under and by virtue of the laws of the State of Arizona; each of said corporations having its principal place of business in the city of Phoenix, State of Arizona. ..

III.

That each of said corporations was organized for the purpose of transacting and engaging in a general banking business in the territory, now State of Arizona, including among the powers granted to each of said corporations under their articles of incorporation, the right, power and authority to engage in and deal in the purchase, sale and acquisition of real and personal property and choses in action, as well as to engage in the business of acquiring by purchase

*Page number appearing at foot of page of original certified Record.

or otherwise, shares of stock, choses in action and any possession or other evidence of value and assets owned by other corporations.

IV.

Your orator alleges that on the 27th day of January, A. D. 1912, on which date The Union Bank & Trust Company, one of the defendants above named, was engaged in business as authorized by its articles of incorporation, it became, as *your is* informed and believes, and upon such information and belief alleges the truth to be, financially embarrassed to such an extent as [2] rendered it unable promptly to meet its liabilities and for the purpose of relieving itself of its obligations promptly to pay off and discharge said liabilities, entered into a certain agreement with The Valley Bank of Phoenix, the other defendant hereinabove named, under and by the terms of which in consideration of The Valley Bank of Phoenix assuming and agreeing to pay all of the depositors in said The Union Bank & Trust Company, the amounts due them as the same should be demanded, and also to pay all the banks the amount due such banks as such should be demanded, and to pay all taxes due from whatever source assessed against or due from said The Union Bank & Trust Company as the same should be demanded and the payment of outstanding certificates of deposit or other evidences of indebtedness issued by said The Union Bank & Trust Company as the same should become due and payable, together with all outstanding cashiers' checks issued and outstanding by said The Union Bank & Trust Company, said The Union

Bank & Trust Company on said date did transfer, assign, deliver and set over unto the said The Valley Bank of Phoenix, absolutely and without condition, and as hereinabove set forth for the express purpose of facilitating the payment of any indebtedness arising through any of the above-mentioned causes, all of the cash on hand belonging to said The Union Bank & Trust Company, together with all negotiable paper payable to it and all the bonds belonging to it and all securities of other corporations belonging to or held by it, and all of its claims, demands, equities and interests whatsoever, then owned by said The Union Bank & Trust Company against any and all other persons, companies, corporations or copartnerships and against the property of all such other persons, companies, corporations or copartnerships; and the said The Valley Bank of Phoenix in consideration of said agreement and of said assignment and conveyance so by said The Union Bank & Trust Company made and executed, in compliance with the terms [3] of said agreement, which assignments so made and executed were as complainant alleges, delivered to and received by said The Valley Bank of Phoenix, did agree to and did assume the payment of all claims and demands legally due or payable by said The Union Bank & Trust Company to any and all persons, companies, corporations or copartnerships, having or claiming any demands therein described against said The Union Bank & Trust Company.

Said contract and agreement as hereinbove set forth impressed upon said The Valley Bank of Phoenix the duty and obligation of paying off and dis-

charging any and all said indebtedness due from or owing by said The Union Bank & Trust Company subject only to the condition as mentioned in said contract that in the event said The Valley Bank of Phoenix should suffer any loss under the terms of said agreement hereinabove mentioned, J. F. Cleaveland, John P. Orme, George H. N. Luhrs, and J. M. Swetnam therein in said contract signing as individuals and as individual guarantors should guarantee to said The Valley Bank of Phoenix, the payment to said bank of any such deficiency. It is further provided in said contract that said guarantors, upon the payment by them to said The Valley Bank of any deficiency which might remain, and any loss which might be incurred by said The Valley Bank, should be entitled to receive from The Valley Bank all unliquidated assets remaining in its hands. And your orator further alleges that under the terms of said contract the guarantors hereinabove named assume not only the individual responsibility of protecting said The Valley Bank against loss, but acquire, under the terms of said contract, the rights to any assets which might remain, to their use and for their individual benefit. And your orator alleges that said contract of guaranty so made and entered into by the said J. F. Cleaveland and the others of said guarantors hereinabove mentioned and named, was and is a personal contract of guaranty made in their individual capacities, and not for the benefit of said [4] The Union Bank & Trust Company or any of the stockholders thereof; and your orator further alleges that upon the execution of said contract

and agreement and the delivery to and acceptance by said The Valley Bank of Phoenix of the assignment of all of said securities so by said contract assigned and delivered to said The Valley Bank of Phoenix, said The Union Bank & Trust Company became and thereby was completely discharged from any and all liabilities theretofore existing for the payment by it of any and all payments or obligations due or to become due to any of its depositors, save and excepting only the liability of its directors to pay out of their personal funds by reason of their personal liability as directors, any deficiency which might exist in the payment to its depositors of the amount of their deposits; said guaranty so made by said persons was and is by the terms of said contract, a conditional guaranty only, determinable at the expiration of three (3) years from said 27th day of January, A. D. 1912, and your orator alleges upon information and belief that the assets so by said The Union Bank & Trust Company transferred to The Valley Bank of Phoenix as hereinabove set forth were of a fair, just and reasonable value of more than Four Hundred Thousand (\$400,000.00) Dollars and that said assets of such value were greatly in excess of the liabilities of The Union Bank & Trust Company on said 27th day of January, A. D. 1912, and could by said The Valley Bank of Phoenix be converted into cash in an amount largely in excess of any amount necessary to discharge and pay off the liabilities of The Union Bank & Trust Company on said date. Said contract, together with the schedule of debts and obligations before the execution of

said contract due from said The Union Bank & Trust Company and to be by said Bank performed, being annexed to this petition for reference and marked exhibit "A" and exhibit "A-1." [5]

Your orator further alleges that in the month of February, A. D. 1913, one J. K. Tennant, who at that time was the president of The Union Bank & Trust Company represented to complainant that the outstanding debts and obligations due and owing from The Union Bank & Trust Company had been liquidated by and under the terms of the contract with The Valley Bank of Phoenix hereinabove mentioned, and that said The Union Bank & Trust Company was a going corporation in a solvent condition and could with advantage to stockholders invest a large amount of money in safe and profitable investments and securities in the State of Arizona, and solicited from said complainant the transfer by it to The Union Bank & Trust Company of negotiable securities for the purpose of being handled and invested by The Union Bank & Trust Company in the State of Arizona, and further represented to complainant that in exchange for One Hundred Thousand (\$100,000.00) Dollars of mortgages and other first-class securities at said time owned and controlled by complainant, it would sell to complainant its eight (8%) per cent cumulative preferred stock to the extent of about Eighty-three Thousand (\$83,000.00) Dollars upon the basis of the then book value of said stock, which was represented to be of the value of one hundred and Seventy-four Dollars (\$174.00) per share, and in addition thereto, pay to complainant, the sum of

about Seventeen Thousand (\$17,000.00) Dollars in money as a consideration for the purchase by The Union Bank & Trust Company of said securities and mortgages.

On the 5th day of February, A. D. 1913, at an adjourned meeting of the stockholders of The Union Bank & Trust Company, held in the office of said company, a resolution was passed, reciting that the value of the assets of the portion of the business conducted by complainant relating to the handling and dealing in first mortgages upon real property was ascertained to be the sum of One Hundred Thousand (\$100,000.00) Dollars [6] and further reciting that it was the desire of said The Union Bank & Trust Company to purchase said mortgage business in said amount and to pay therefor, in money and in shares of preferred stock of The Union Bank & Trust Company, and the president and secretary of said The Union Bank & Trust Company were at said stockholders' meeting, directed and empowered to make such purchase of such assets and to pay therefor a sum not greater in the aggregate than the book value of the assets of said mortgage business of complainant in the following manner, to wit:

By the payment of the sum of Seventeen Thousand Six Hundred Thirty-six (\$17,636.00) in money and the balance of said One Hundred Thousand (\$100,000.00) Dollars in preferred stock of said The Union Bank & Trust Company, said preferred stock being entitled to share in a preferred dividend of eight (8%) per cent annually and such dividends and interest to be cumulative at the price to be ascer-

tained and upon the basis of the then present book value of said stock and to issue thereafter sufficient shares of said stock, which issue in addition to the amount of money above specified should equal in value the ascertained value of the assets of the mortgage portion of the business of the Western Underwriting & Mortgage Company so to be purchased.

And thereafter on the 26th day of March, A. D. 1913, pursuant to the requirements of said resolution, said The Union Bank & Trust Company did issue in the name of complainant Four Hundred Seventy-two (472) shares of the preferred stock hereinabove mentioned and paid to complainant the sum of Seventeen Thousand Six Hundred Thirty-six (\$17,636.00) Dollars in money, thereupon complainant, by proper endorsements and assignments, transferred, set over and assigned unto said The Union Bank & Trust Company, first mortgage notes and mortgages and delivered said assignments to said The Union Bank & Trust [7] Company, out of a total number of two thousand (2,000) shares of such preferred stock now outstanding, all of which complainant alleges is shown by the stock transfer books of said The Union Bank & Trust Company. A schedule of the assets delivered by complainant to The Union Bank & Trust Company in exchange for said shares of stock and money paid is hereto attached, annexed for reference and marked exhibit "B."

VI.

In the month of May, A. D. 1913, and subsequent to the delivery by complainant to The Union Bank & Trust Company and the acquisition by it of the

shares of preferred stock as hereinabove mentioned and while the contract hereinabove referred to as the contract of January 27th, 1912, was in full force and effect and had been by the parties thereto neither abrogated or modified and while as your orator alleges defendant, The Valley Bank of Phoenix was collecting the assets assigned to it under the terms of said contract and using said collections for its own purposes and on its own account under the terms of said contract, and at a time when under the terms of said contract there could have existed no liability on the part of The Union Bank & Trust Company to said The Valley Bank of Phoenix, and at a time when there could have been no contingent liability on the part of the individuals made parties to said contract as guarantors of the collections to be made by The Valley Bank of Phoenix, the board of directors of said The Union Bank & Trust Company as complainant alleges, did, without any moving and just or legal consideration whatsoever, authorize the execution and delivery by said The Union Bank and Trust Company to The Valley Bank of Phoenix of its certain promissory note in the sum of One Hundred Sixty-four Thousand Four Hundred Thirty-two and 46/100 Dollars (\$164,432.46) which said promissory note, as your orator is informed and believes, was delivered to said The Valley Bank of Phoenix and as your orator is [8] informed and believes is now held by said The Valley Bank of Phoenix under claim by it made that it is an evidence of the indebtedness of said The Union Bank & Trust Company to said The Valley Bank of Phoe-

nix of One Hundred Sixty-four Thousand Four Hundred Thirty-two and 46/100 Dollars (\$164,532.46) with accrued interest; and your orator alleges that said transaction so authorized and entered into by the board of directors of The Union Bank and Trust Company was and is wholly void for the reason that the board of directors were unauthorized to execute the said note; that the meeting of said board was neither called nor held in conformity with the by-laws of said The Union Bank & Trust Company; that said note was given wholly without any consideration passing from The Valley Bank of Phoenix to The Union Bank & Trust Company and that said promissory note, if delivered for any purpose was delivered and is held by The Valley Bank of Phoenix as additional security for the performance by the individuals named in said contract of January 27th, A. D. 1912, as guarantors in their individual capacity against loss by the Valley Bank of Phoenix on account of collection to be by it made on its own account under the terms of said contract. That said promissory note is without consideration for the further reason that under the terms of said contract of January 27th, A. D. 1912, there could exist no liability on the part of The Union Bank & Trust Company or on the part of the individuals acting thereunder as guarantors until such liability, of any there existed, should be ascertained at the expiration of three (3) years from the date of said contract, and your orator alleges that in the execution and delivery by said board of directors of said promissory note, said board of directors acted fraud-

ulently and without authority and in a manner so as to greatly injure your orator and other stockholders similarly situated, as stockholders of said The Union Bank & Trust Company and greatly depreciate the value [9] of the stock so by it owned to the extent of four hundred seventy-two (472) shares of preferred stock as hereinabove set forth, and such stock has thereby become and now is greatly depreciated in value.

VII.

Your orator further alleges that on December 30th, 1913, and at all times prior thereto since the 27th day of January, A. D. 1912, the contract hereinabove in this bill of complaint mentioned and set forth, between The Union Bank & Trust Company and The Valley Bank of Phoenix, was in full force and effect, and had not been changed or modified as to its terms, but notwithstanding, as your orator alleges, that said contract by its terms imposed upon The Valley Bank of Phoenix the duty, obligation and liability of discharging and paying off all indebtedness and obligations up to said 27th day of January, A. D., 1912, incurred by or due from The Union Bank & Trust Company, and notwithstanding the fact as herein alleged that in addition to said contract said The Union Bank & Trust Company attempting to act in the premises, did without further, other or additional consideration than that mentioned in said contract of January 27th, A. D. 1912, execute and deliver to said The Valley Bank of Phoenix its note for One Hundred Sixty-four Thousand Four Hundred Thirty-two and 46/100 Dollars (\$164,-

432.46) as hereinabove set forth; and notwithstanding the fact that on the 26th day of March, A. D. 1913, your orator, upon the representations so by the officers of said The Union Bank & Trust Company made as hereinabove set forth, delivered by proper endorsement and assignment to The Union Bank & Trust Company One Hundred Thousand (\$100,000.00) Dollars of first-class negotiable securities as hereinabove in this bill of complaint set forth; and notwithstanding as your orator alleges upon information and belief that said assets so by said The Union Bank & Trust Company purchased from your orator at the times and for the consideration [10] hereinabove mentioned, constituted practically all of the assets owned by said The Union Bank & Trust Company on the 30th day of December, A. D. 1913, said board of directors of The Union Bank & Trust Company at a meeting of said board purported to have been called for this purpose by resolution of the board of directors and not of the stockholders of said The Union Bank & Trust Company, entered into a certain contract with defendant, The Valley Bank of Phoenix, under and by the terms of which and purporting to act in behalf of The Union Bank & Trust Company, the directors thereof again transferred, assigned and set over unto said The Valley Bank of Phoenix each, all and every of the entire property and assets then owned by said The Union Bank & Trust Company included in which assignment were all of such portions as then remained in the hands of The Union Bank & Trust Company of the assets by said The Union Bank & Trust Company

acquired by purchase from your orator. It is recited in said resolution so authorizing the transfer of said assets as hereinabove mentioned that because on the 27th day of January, A. D. 1912, The Union Bank & Trust Company entered into a contract and agreement whereby said The Union Bank & Trust Company transferred to the Valley Bank of Phoenix certain assets in consideration of the payment by said The Valley Bank of Phoenix of all depositors in said The Union Bank & Trust Company, and the other indebtedness of said The Union Bank & Trust Company, in which contract the said J. F. Cleaveland, John P. Orme, George H. N. Luhrs and J. M. Swetnam, who are referred to and mentioned as guarantors and under the terms of which contract said guarantors agreed, at the end of three (3) years from the date of said contract, to pay to said The Valley Bank of Phoenix such sums of money as said The Valley Bank of Phoenix should have expended on behalf of The Union Bank & Trust Company, and that because said The Valley Bank of Phoenix on said 30th day of December, A. D. 1912, in addition to said assets held [11] the note of said The Union Bank & Trust Company for One Hundred Sixty-four Thousand Four Hundred Thirty-two and 46/100 Dollars (\$164,432.46), which note falls due January 27th, A. D. 1915, and not before said date, and which note it is further recited in said resolution so given by said The Union Bank & Trust Company in liquidation of its indebtedness to said The Valley Bank of Phoenix under said contract, that there remains unpaid upon said indebtedness, (which indebtedness

your orator alleges did not exist under the terms of said contract or if it did exist, was not due or payable until January 27th, A. D. 1915), the sum of Seventy-five Thousand (\$75,000.00) Dollars. And it is further recited in said resolution that said The Union Bank & Trust Company was willing to transfer and assign all of said assets to said The Valley Bank of Phoenix in consideration that The Valley Bank of Phoenix should release it from further claim or liability to it under the aforesaid contract of January 27th, A. D. 1912.

And your orator alleges the terms of said contract of January 27th, 1912, there existed no indebtedness due from said The Union Bank & Trust Company or owing to said The Valley Bank of Phoenix and they said transfer of assets by the board of directors of said The Union Bank & Trust Company to said The Valley Bank of Phoenix so by said board of directors made on the 30th day of December, A. D. 1913, was and is void for the following reasons, to wit:

That by the terms of said resolution an attempted transfer of all of the assets of said The Union Bank & Trust Company was made by said board of directors thereof, without action or authority given by the unanimous consent of the stockholders thereof, or by the consent of any stockholders had or obtained at a stockholders' meeting.

That said transfer was void for want of consideration moving from The Valley Bank of Phoenix to The Union Bank & [12] Trust Company in this, to wit: That at the time of said transfer of assets,

The Union Bank & Trust Company was not indebted to The Valley Bank of Phoenix in any sum whatsoever, which fact your orator alleges was then and there well known to the officers and directors of The Union Bank & Trust Company and of The Valley Bank of Phoenix, defendants herein.

That said assignment of assets so made was by the then directors of The Union Bank & Trust Company for the sole purpose of relieving the said J. F. Cleaveland, John P. Orme, George H. N. Luhrs and J. M. Swetnam of a possible and undetermined contingent liability as guarantors under the contract of January 27th, A. D. 1912, which liability, if any, there might have existed, was undetermined and under the terms of said contract could not be determined before January 27th, A. D. 1915. A copy of said contract and agreement dated December 30th, A. D. 1913, together with exhibits and schedules of assets and property so under the terms of said contract assigned to said The Valley Bank of Phoenix as hereinabove set forth, is hereto attached, marked for reference, "exhibit 1" and the schedules attached to said "exhibit 1" are for designation and reference, marked respectively "exhibits 2, 3, 4, 5, 6, 7, 8, 9, and 10."

VIII.

Your orator alleges that by the terms of the articles of incorporation of The Union Bank & Trust Company, and amendments thereof, and the by-laws adopted by said company, the owners of preferred shares of stock are not entitled to vote at stockholders' meetings and have no voice in the control or man-

agement of the affairs of said company, nor in the election of directors or officers thereof; that as a result of the unauthorized, fraudulent and void actions taken and attempted to be taken by the voting stockholders being the owners of shares of common stock of The Union Bank & Trust Company and the directors thereof, the stock of your orator, to the extent of four [13] hundred seventy-two (472) shares of the preferred stock of said company has been rendered valueless and said The Union Bank & Trust Company by its refusal to enforce the replacement in its treasury of all of the assets so by it transferred and by its refusal to demand and enforce the return by said The Valley Bank of said promissory note for One Hundred Sixty-four Thousand Four Hundred Thirty-two and 46/100 Dollars (\$164,432.46) hereinabove mentioned, which refusal on the part of said board of directors is hereinafter in this bill of complaint more particularly mentioned and described, have deprived your orator and other stockholders similarly situated of all and every asset and thing of value out of which your orator and other stockholders similarly situated may hope or expect to be paid their earnings of eight (8%) per cent per annum upon the preferred stock so held by your orator and such other stockholders, and of all and every asset whatsoever, upon the earnings and investment of which, said preferred stock so sold and issued to your orator and other stockholders similarly situated depends for its value and earning power, and that the stock now owned by your orator and other stockholders similarly situated, is as hereinabove alleged

and for the reasons hereinabove set forth of no value whatsoever.

IX.

Your orator alleges that prior to the commencement of this suit between the hours of ten o'clock A. M. and five o'clock P. M. on the 28th day of February, A. D. 1914, *it* made a written demand upon the representative of said The Union Bank & Trust Company to commence appropriate proceedings against The Valley Bank of Phoenix for the purpose of securing the cancellation and return of said note for One Hundred Sixty-four Thousand Four Hundred Thirty-two and 46/100 Dollars (\$164,432.46) so held by said The Valley Bank of Phoenix, and also for the purpose of securing a reassignment and replacement by The Valley [14] Bank of Phoenix of all of the assets so as your orator alleges fraudulently and unlawfully conveyed to said The Valley Bank of Phoenix by The Union Bank & Trust Company on the 30th day of December, A. D. 1913, but that said board of directors, notwithstanding said demand so made, has refused and still does refuse to commence said suit or to take any steps whatsoever to recover said assets or cause a cancellation of said note, and your orator further alleges that it would be useless to endeavor to call a stockholders' meeting for the purpose of instructing said board of directors to commence said suit for the reason that it is advised by the lawfully constituted representative of one W. L. Rosa, the owner of a majority of the voting common stock of said The Union Bank & Trust Company, that at said meeting of

stockholders if so called for such purpose, he would cause to be voted his majority stock so by him owned against the passage of a resolution instructing said board of directors and officers of said The Bank & Trust Company to commence such suit.

PROPOSED AMENDMENT TO BILL OF COMPLAINT TO BE INSERTED AFTER LINE 19, Page 15, following the words "to commence such suit," being the closing of paragraph 9 of the Bill of Complaint herein.

"Your orator further alleges that W. L. Rosa, hereinabove mentioned, was the owner of the majority of the common stock entitled to be voted at a stockholders' meeting of the Union Bank & Trust Company prior to the bringing of this action on March 5th, 1914, for that notwithstanding the fact that prior to the bringing of this action, there appeared upon the stock transfer books of The Union Bank & Trust Company a record purporting to fix the ownership of 251 shares of the common stock of said Union Bank & Trust Company in the Western Underwriting & Mortgage Company, Complainants herein. In truth and in fact, the Western Underwriting & Mortgage Company is the pledgee only of said 251 shares, which said shares of stock were, without authority of the Western Underwriting & Mortgage Company, and without consideration therefor, caused by one J. K. Tennant to be transferred from his name to the name of the Western Underwriting & Mortgage Company and that said shares of stock so

purporting to be issued to the Western Underwriting & Mortgage Company were in truth and in fact the stock of the said J. K. Tennant, and were at said time and now are held by the Western Underwriting & Mortgage Company as security only for the payment of a note for \$40,000 given by the said J. K. Tennant to Complainant here.

“And your orator further alleges in this connection, that, since the date of the purported issuance of said stock to Western Underwriting & Mortgage Company, under the conditions hereinabove set forth, the said J. K. Tennant has at all times refused to vote said stock at any meeting of stockholders of the Union Bank & Trust Company.

“Your orator further alleges that it would have been useless to appeal to the stockholders of The Union Bank & Trust Company to bring this action for the reason that under the Articles of Incorporation of the said Union Bank & Trust Company and the laws of the State of Arizona, the stockholders of a corporation are without power to bring such an action acting as a body aggregate, or to compel the bringing of such action by the board of directors, any of its officers, or by anyone else.”

X.

Your orator alleges that this is a civil suit in the nature of a bill in equity and that the matter in dispute exceeds, exclusive of costs and interest, the sum of Three Thousand (\$3,000.00) dollars and that

there has been no collusion between your orator and defendants, or either of them, or the officers thereof, for the purpose of conferring jurisdiction upon this Court. That under these circumstances, the interference of a court of equity for the protection of the rights of your orator and of other stockholders similarly situated is imperatively required to the end that the assets of the Union Bank & Trust Company so as your orator alleges fraudulently and unlawfully dissipated, and so assigned and transferred to The Valley Bank of Phoenix shall be replaced in the treasury of the Union Bank & Trust Company for the benefit of your orator [15] and other stockholders similarly situated.

INASMUCH, THEREFORE, as your orator has no adequate remedy at law for the redress of grievances complained of and can have relief only in equity, your orator files this bill of complaint in behalf of itself and all other stockholders of The Union Bank & Trust Company similarly situated or who may care to intervene in these proceedings and prays for equitable relief as follows:

(1) That defendant, The Valley Bank of Phoenix, be required to answer the matters and things charged in this bill of complaint, but not under oath, answer under oath being hereby waived, and particularly that said defendant be required to disclose unto this Honorable Court every and all assets, securities, choses in action or possession, or other assets whatsoever received by said The Valley Bank of Phoenix from The Union Bank & Trust Company under all assignments and transfer thereof, assigning or trans-

ferring any assets, securities, choses in action or possession by said The Union Bank & Trust Company to The Valley Bank of Phoenix by virtue of a certain contract and agreement entered into between said defendants on the 30th day of December A. D. 1913.

(2) That defendant, The Valley Bank of Phoenix, be required in said answer to make full and complete disclosure unto this Honorable Court of the disposition by it of any and all of said assets with full and complete disclosure of any and all amounts by said The Valley Bank of Phoenix collected out of said assets so by it received from The Union Bank & Trust Company, under the terms of said contract.

(3) For the decree of this Honorable Court adjudging the transfer by The Union Bank & Trust Company to The Valley Bank of Phoenix of all of the assets, securities and choses in action included in and transferred under the terms of that [16] certain contract entered into between said defendants on the 30th day of December, A. D. 1913, be declared to be null and void and of no force and effect whatever, and that said The Valley Bank of Phoenix be required to retransfer all said assets and securities so by it received, to The Union Bank & Trust Company for the benefit of your orator and all other stockholders similarly situated, or in the event said reassignment and retransfer of said assets and securities cannot be had, that said The Valley Bank of Phoenix be required to pay to The Union Bank & Trust Company for the benefit of your orator and other stockholders similarly situated, the just,

fair and reasonable value in money of any assets which by reason of the disposition, sale or alienation thereof by The Valley Bank of Phoenix, said bank is unable to reassign and transfer to the Union Bank & Trust Company.

(4) For a decree of this Honorable Court that the execution and delivery of a certain promissory note dated May 13th, 1913, for the sum of One Hundred Sixty-four Thousand Four Hundred Thirty-two and 46/100 Dollars (\$164,432.46) be declared to be without consideration, fraudulent and void as against your orator and other stockholders similarly situated and that said promissory note be canceled and returned to The Union Bank & Trust Company for the benefit of your orator and other stockholders similarly situated.

(5) That a writ of subpoena may be granted to your orator to be directed to defendants and each of them, thereby requiring defendants to appear on a certain day before this Court and then and there full, true, direct and perfect answer make to all and singular the premises (but not under oath, an answer under oath being hereby expressly waived), and further to perform and abide by such further order, direction or decree therefor, as to this Court shall seem just and proper.

(6) That your orator have such other and further relief [17] as to this Honorable Court may seem

just and equitable in the premises. And your orator will ever pray.

A. J. MORGANSTERN,
400-407 Tinken Building, San Diego, Cal.,
C. A. A. McGEE,
400-407 Tinken Building, San Diego, Cal.,
E. J. HENNING,
400-407 Tinken Building, San Diego, Cal.,
E. E. HENDEE,
400-407 Tinken Building, San Diego, Cal.,
GEORGE J. STONEMAN,
Goodrich Block, Phoenix, Arizona,
REESER M. LING,
Goodrich Block, Phoenix, Arizona,
Solicitors for Complainant. [18]

State of California,
County of San Diego,—ss.

C. R. Fitz Gerald, being first duly sworn, deposes and says that he is the President of the Western Underwriting & Mortgage Company, a corporation organized and existing under the laws of the State of California, complainant above named; that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true of his own knowledge, except as to those matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

C. R. FITZ GERALD.

Subscribed and sworn to before me this 3d day of
March, A. D. 1914.

[Seal]

H. B. DANIEL,

Notary Public in and for the County of San Diego,
State of California.

My commission expires October 22d, 1916. [19]

Exhibit "A" [to Complaint—Agreement].

THIS AGREEMENT made and entered into this
27th day of January, 1912, by and between the
Union Bank and Trust Company, a corporation, of
Phoenix, Arizona, party of the first part, and J. F.
Cleaveland, John P. Orme, George H. N. Luhrs and
J. M. Swetnam, parties of the second part, and The
Valley Bank of Phoenix, a corporation of Phoenix,
Arizona, party of the third part,

WITNESSETH: That the party of the first part,
for and in consideration of the agreements of the said
party of the third part that it will pay all of the de-
positors in the bank of said first party the amount
due them from said Union Bank & Trust Company
as the same shall be demanded; also pay all of the
banks the amount due such banks from the Union
Bank & Trust Company as the same shall be de-
manded; also pay all taxes due to the Govern-
ment of the United States, the territory of Arizona,
the county of Maricopa and the city of Phoenix, as
the same shall be demanded, also all outstanding
certificates of deposit issued by the first party, as
the same shall be due and payable; also pay all out-
standing cashiers checks issued by said first party,
as the same shall be due and payable, all as per
schedule of indebtedness hereto attached and

marked exhibit "A" and made a part hereof; does hereby transfer, assign, deliver and set over to the said party of the third part absolutely, the following property, to wit:

All of the cash on hand and belonging to the party of the first part, all of the negotiable paper payable to it, properly endorsed; all of the bonds belonging to said first party; all stocks in other corporations belonging to or held by said first party, all of its claims, demands, equities and interests whatsoever which said first party has against any other person, corporation or copartnership or to or in or against the property of any other person, copartnership or corporation, a list of which said assets and property is hereto attached and marked exhibit "B" and made a part of this agreement. [20]

And the said parties of the second part hereby stipulate and agree to and with the said party of the third part, that they will and do hereby guarantee, jointly and severally, to the Valley Bank of Phoenix, the payment to the party of the third part of any deficiency which may remain at the end of three years from the date of this contract, unpaid, after applying all of the cash received and collected and all securities collected and reduced to cash, upon the amount of the indebtedness of the party of the first part which the said party of the third part has paid or will be obligated to pay under the terms of this compact; and that they, the said second parties, will also repay to said third party all costs and expenses which the said third party may incur in reducing said assets to cash or in collecting the moneys due on such securi-

ties and evidences of indebtedness as are collectible; said payments to be made by said second parties to said third parties at the expiration of three years from the date hereof, provided, however,

IT IS EXPRESSLY UNDERSTOOD and agreed by and between all the parties hereto that the liability of John P. Orme shall be limited to the payment by him of Five Thousand Dollars (\$5,000.00) to the party of the third part in full settlement of his guarantee and upon the payment of said sum he shall be released from any further liability.

IT IS FURTHER EXPRESSLY UNDERSTOOD AND AGREED that as between all of the above-named grantors, each of them shall be liable for the moneys paid said third party as hereinbefore set forth in the proportion that the stock owned and controlled by said individual guarantors shall bear to the total stock owned and controlled by all of said guarantors and that each of said guarantors is and shall be entitled to contribution from the other guarantors for moneys so paid by him over and above his pro rata, except that in no event shall John P. Orme be called upon to pay more than the sum of \$5,000. [21]

That the said third party for and in consideration of the delivery to it of the assets hereinabove mentioned, and the execution of this agreement by the parties of the first and second part hereby covenants and agrees to pay all of the specified debts mentioned in said schedule hereto attached and marked exhibit "A" and made a part hereof. And when such deficiency, if any there shall be, shall be paid by the parties of the second part, or any of them, then the

party of the third part shall reassign, transfer and deliver to the guarantors paying such deficiency all of said assets not reduced to cash then in the hands of said third party.

IN WITNESS WHEREOF the parties hereto have executed these presents the day and year first above written.

UNION BANK & TRUST COMPANY.

By J. F. CLEVELAND,

President.

[Seal]

Attest: HARRY L. SHEDD,

Cashier.

JOHN P. ORME,

J. F. CLEVELAND,

J. M. SWETNAM,

GEO. H. N. LUHRS,

Parties of Second Part.

THE VALLEY BANK OF PHOENIX.

By E. J. BENNITT,

President.

[Seal]

Attest: LLOYD B. CHRISTY,

Cashier. [22]

Territory of Arizona,

County of Maricopa,—ss.

Before me, I. B. Noyes, a notary public in and for said county, Arizona territory, on this day personally appeared J. F. Cleaveland and Harry L. Shedd, known to me to be the persons whose names are subscribed to the foregoing instrument as president and secretary of the corporation described in the foregoing instrument, and as such president and secretary acknowledged to me that they executed the same

for said corporation for the purpose and consideration therein expressed, as its free act and deed, and by each of them voluntarily executed.

Given under my hand and seal of office this 27th day of January, A. D. 1912.

[Seal]

J. B. NOYES,
Notary Public.

My commission expires May 7, 1914.

Territory of Arizona,
County of Maricopa,—ss.

Before me, I. B. Noyes, a notary public in and for said county, Arizona territory, on this day personally appeared E. J. Bennitt and Lloyd B. Christy, known to me to be the persons whose names are subscribed to the foregoing instrument as president and secretary of the corporation described in the foregoing instrument, and as such president and secretary acknowledged to me that they executed the same for said corporation, for the purpose and consideration therein expressed, as its free act and deed, and by each of them voluntarily executed.

Given under my hand and seal of office, this 27th day of January, A. D. 1912.

[Seal]

J. B. NOYES,
Notary Public.

My commission expires May 7, 1914.

Territory of Arizona,
County of Maricopa,—ss.

Before me, J. B. Noyes, a notary public in and for the county of Maricopa, territory of Arizona on this day personally appeared John P. Orme, J. F. Cleaveland, J. M. Swetnam, Geo. H. N. Luhrs known to me

to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office, this 27th day of January, A. D. 1912.

[Seal]

J. B. NOYES,
Notary Public.

My commission expires May 7, 1914. [23]

(EXHIBIT "A.")

First Mortgage, W. A. Goodwin	\$7,000.00	5 years
Fullerton, Cal.		
First Mortgage, W. H. Best	9,000.00	5 years
Brawley, Cal.		
First Mortgage, Jackson Deets	14,500.00	3 years
Uplands, Cal.		
First Mortgage, Guarantee Inv. Co.	2,050.00	3 years
Los Angeles, Cal.		
First Mortgage, Benton Turner	17,900.00	3 years
Los Angeles, Cal.		
First Mortgage, Rube Harrison,	12,000.00	3 years
San Diego, Cal.		
First Mortgage, Backer Vineyard Co.	15,000.00	3 years
Fresno, Cal.		
First Mortgage, W. H. O'Bryan	15,000.00	3 years
Los Angeles, Cal.		
First Mortgage, Pacific Utilities & Invest-		
ment Co.	9,900.00	3 years
Los Angeles, Cal.		

Exhibit No. 1 [to Complaint—Contract and Agreement].

COPY.

THIS CONTRACT AND AGREEMENT made and entered into this 30th day of December, 1913, by and between the Union Bank & Trust Company, of Phoenix, Arizona, party of the first part, and The Valley Bank of Phoenix, a corporation of Phoenix, Arizona, party of the second part, WITNESSETH:

WHEREAS, on the 27th day of January, 1912, the above-named parties entered into a contract and agreement wherein and whereby the said first party transferred and delivered to the said second party certain assets belonging to said first party, in consideration that said second party would pay all depositors in said bank of said first party, and also certain other indebtednesses of said first party, more particularly set forth and described in said agreement and contract, and in which said contract the said second party agreed with J. F. Cleaveland, John P. Orme, George H. N. Luhrs and J. M. Swetnam, hereinafter referred to as the guarantors, that they, the said guarantors, would pay to said second party, at the end of three years from the date of said contract, such sum of money as said second party shall have paid out in behalf of the first party, after deducting all moneys collected and realized by said second party out of and from said assets so transferred to said second party by said first party, as more particularly set forth in said contract and

agreement of January 27th, 1912, to which reference is hereby made for a more complete statement of the terms of said agreement, and [25]

WHEREAS, the said second party now holds the note of the first party in the sum of One Hundred Sixty-four Thousand Four Hundred Thirty-two and 46/100 (\$164,432.46) Dollars, dated 17th day of May, 1913, falling due January 27, 1915, and given by first party in liquidation of its indebtedness to said second party under said contract upon the date of its said execution, and

WHEREAS, there remains unpaid upon said indebtedness approximately the sum of One Hundred and Three Thousand (\$103,000.00) Dollars, which exceeds the probable value of the securities now held by second party under said agreement in the estimated amount of Seventy-five Thousand (\$75,000.00) Dollars, and which will make a probable deficit in said last-named amount to be collected out of the general assets of the first party, and

WHEREAS, the said party of the first part is the owner of and in possession of the assets set forth in exhibit "A" hereto attached which have a probable value less than said estimated deficit, and is willing to transfer and assign all of said assets to said second party in consideration that said second party shall release it from any further claim or liability to it under the aforesaid contract of January 27, 1912, and any further claim or liability under said note, and

WHEREAS, the said second party is willing to accept such additional assets set forth in schedule "A"

hereto annexed and release said first party of and from any and all claims to date, on the express understanding and condition, however, that the acceptance of said assets and [26] such release by said second party shall not affect or interfere with, change or modify the guaranty, indemnity and liability assumed and agreed upon by said guarantors in and by said contract and agreement of January 27, 1912.

NOW, THEREFORE, this agreement witnesseth:

1. That the said party of the first part in consideration of the agreement on the part of the second party hereinafter contained and set forth, and pursuant to the authority and resolution of its board of directors duly given and adopted at a meeting called for that purpose, does hereby transfer and assign and set over unto the said Valley Bank of Phoenix, each, all and every the property and assets set forth and specified in schedule "A" hereto annexed and made a part hereof;

TO HAVE AND TO HOLD the same for its own use and benefit, and with full power to handle, sue for, collect, release or otherwise deal with, the same, as may be necessary or convenient, and with full power to do any and everything which the said first party could or might do in the premises in connection with said assets or any of them, had this assignment and transfer not been made; and deliver any and all other instruments or documents which may be necessary or convenient for the proper transfer or conveyance of said assets or any of them, or of the interest of the first party in or to them or any of them.

2. The party of the second part in consideration of the said transfer and assignment aforesaid does hereby [27] release and discharge the said first party of and from any and all claims and demands to the date hereof; PROVIDED, however, that such release shall in no way affect the rights and privileges now held and possessed by the said second party against the said guarantors, arising out of or by virtue of the said contract and agreement of January 27, 1912, hereinbefore referred to.

3. And it is understood and agreed between the parties hereto, for the protection and in the interest of said guarantors, that the said second party shall proceed with all due diligence and all reasonable dispatch, having due regard for the nature of the said assets so delivered to it, to handle and collect the same and reduce the same to cash, and apply the same in the settlement of said indebtedness, as contemplated by said contract of January 27, 1912.

IN WITNESS WHEREOF, the parties hereto have executed these presents the day and year first above written.

THE UNION BANK & TRUST COMPANY.

By JOHN P. ORME,
Vice-president.

[Seal]

Attest: A. H. KLEIN,
Secretary.

THE VALLEY BANK OF PHOENIX,

By E. J. BENNITT,
Its President.

[Seal]

Attest: LLOYD B. CHRISTY,
Secretary. [28]

The undersigned being the persons named in the foregoing agreement and therein referred to as the guarantors, each for himself consents to the release of the Union Bank & Trust Company from further claim or liability of the Valley Bank upon the indebtedness of said Union Bank & Trust Company to said Valley Bank in consideration of the transfer by said Union Bank & Trust Company to said Valley Bank of the additional assets in said agreement named and specified, and agrees not to urge such release from liability as a defense to any action which the said Valley Bank may hereafter bring against him either individually or with any of said guarantors, but this waiver is to be strictly construed and is to be limited to such defense, and nothing herein contained shall defeat, impair, or prejudice any other defense which may now exist or which may hereafter arise in favor of us, or any of us, in any such action or suit.

(Signed) J. F. CLEVELAND.

(Signed) JOHN P. ORME.

(Signed) GEORGE H. N. LUHRS.

(Signed) J. M. SWETNAM. [29]

Exhibit No. 2 [to Complaint—List of Assets].

**LIST OF ASSETS TO BE TRANSFERRED BY
UNION BANK & TRUST COMPANY TO THE
VALLEY BANK UNDER THE FOREGOING
AGREEMENT.**

PROMISSORY NOTES AND MORTGAGES.

Richard Allen, dated July 9, 1912, due Oct. 9, 1912.

Consolidated Mines Co. of Arizona, dated Aug. 2, 1912, due demand.

J. R. Hughes, dated Jan. 9, 1912, due demand.

J. R. Hughes, dated Feb. 10, 1912, due demand.

J. R. Hughes, dated Feb. 26, 1912, due demand.

H. F. Jordan, dated Oct. 22, 1912, due Nov. 22, 1912.

F. H. Thompson, dated Nov. 18, 1912, due Dec. 18, 1912.

F. H. Thompson, dated Oct. 26, 1912, due Dec. 26, 1912.

J. F. Cleaveland, dated May 27, 1913, due May 27, 1914.

J. F. Cleaveland, dated May 27, 1913, due May 27, 1914.

Seaborn and Ida E. Stone, dated Sept. 1, 1912, due Sept. 1, 1913.

Seaborn and Ida E. Stone, dated Sept. 1, 1912, due Sept. 1, 1914.

(Secured by First Mortgage on about 1000 acres of land in San Diego Co., Cal., said to be worth about \$35,000.)

Mary B. Lewis, dated Feb. 25, 1913, due Feb. 25, 1918.

Mary B. Lewis, dated Feb. 25, 1913, due Feb. 25, 1918.

(Secured by first mortgage on improved residence property, City of Los Angeles, said to be worth about \$20,000.)

Ellen May Barnhard, dated Sept. 18, 1912, due Sept. 18, 1915.

(Secured by first mortgage on Lot 7, Blk. 49, Churchill Addn., improved with house, property said to be worth about \$2,500.)

Anna and J. A. Lewis, dated April 5, 1912, due April 5, 1913.

(Secured by 1st mortgage, Lot 7, Blk. 18, Collins Addn., said to be worth amout \$800.00.)

J. M. Phelps, dated Feb. 26, 1912, due Aug. 26, 1912.

(Secured by chattel mortgage, horses and wagon, chattel said to be dead or N. G.)

Richard W. Bishop, dated Apr. 6, 1912, due Oct. 6, 1912.

(Secured by 4 horse on 6 Bar Ranch, Squaw Creek.)

C. M. Cope, dated Nov. 15, 1912, due May 15, 1913.

(Supposed to be secured by 14 milch cows, but no record of such mortgage.)

W. S. Furman, dated Sept. 17, 1912, due Oct. 17, 1912.

(Chattel mortgage office furniture.)

Fred Younge, dated April 22, 1912, due April 22, 1913.

(His father, Levi Younge, has promised to protect.)

Alexandria Moore, dated Mar. 5, 1913, due June 5, 1913.

(Guaranteed by attorney Lewis T. Carpenter.)

Lucinda Lewis, dated Sept. 30, 1911, due Sept. 30, 1914.

(Secured by Realty Contract said to be worth about \$500.) [30]

Exhibit No. 3 [to Complaint—Bonds].

BONDS.

22 Bonds San Diego County Road District Improvement #1 Bonds, 6%.

REAL ESTATE.

Lot 27, Blk. 24, Capitol Addn., due from Mrs. Eddy on contract.

Lot 1 & N.½ Lot 3, Blk. 5, Grand Ave. Addn., due from Barkley on contract.

Lots 5 and 6, Thomas Tract, due from **Mr. Love** on contract.

Lot 5, Block 44, Spaulding Subdvn., mortgage on same \$1,100.

Lot 25, Block 1, Brown & Holsinger Tract, Germania Place, W.½, SE.¼ of NW.¼ Sec. 3, Tl. Nr. 3 E., G&SB&M. (Mortgage on same \$1,200.)

NW.¼ and N.½ and SW.¼ of the NE.¼ of Sec. 34 TLE of G&SB&M.

Furniture and fixtures.

Lease of bank building. [31]

Exhibit No. 4 [to Complaint—Quitclaim Deed].

QUITCLAIM DEED.

This indenture made this 31st day of December, 1913, between the Union Bank & Trust Company, a corporation of Phoenix, Arizona, party of the first part, and The Valley Bank of Phoenix, a corporation of the same place, party of the second part,

WITNESSETH: That the said party of the first part, for and in consideration of the sum of one dollar and other valuable consideration, to it in hand paid by the said second party, the receipt whereof

is hereby acknowledged and confessed, has remised, released, conveyed and quitclaimed, and by these presents does hereby release, remise, convey and quitclaim unto the said party of the second part, and to its successors and assigns, forever, all the right, title, interest, claim, demand and equity which the said party of the first part has in and to the following described real estate and property situate in the County of Maricopa and State of Arizona, to wit:

(1) Lot twenty-seven (27) in Block twenty-four (24) of Capitol Addition to the City of Phoenix, Arizona, according to the map or plat of said Capitol Addition now on file in the office of the County Recorder of Maricopa County, Arizona.

(2) Lot One (1) and the north half (N.1/2) of Lot Three (3) in Block Five (5) of Grand Avenue Addition to the City of Phoenix, Arizona, according to the map or plat of said Grand Avenue Addition to the City of Phoenix, now on file in the office of the County Recorder of Maricopa County, Arizona.

(3) Lots Five (5) and Six (6) in Thomas Tract according to the map or plat of said Thomas Tract, now on file in the office of the County Recorder of Maricopa County, Arizona.

(4) Lot Five (5) in Spaulding's Subdivision of Block forty-four (44) of Churchill's Addition to the City of Phoenix, Arizona, according to the map or plat of said Spaulding's Subdivision now on file in the office of the County Recorder of Maricopa County, Arizona.

(5) Lot twenty-five (25) in Block One 9LO of Brown & Holsinger Tract (being a subdivision of

Germania Place) according to the map or plat of said Brown and Holsinger Tract now on file in the office of the County Recorder of Maricopa County, Arizona.

(6) The west half (W. $\frac{1}{2}$) of the Southeast quarter (SE. $\frac{1}{4}$) of the southwest quarter (SW. $\frac{1}{4}$) of the Northwest quarter (NW. $\frac{1}{4}$) of Section Three (3) in Township One North of Range Three East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona. [32]

(7) The northwest quarter (NW. $\frac{1}{4}$); the North half (N. $\frac{1}{2}$) and southwest quarter (SW. $\frac{1}{4}$) of the Northeast quarter (NE. $\frac{1}{4}$) of Section Thirty-four (34) in Township One North of Range One East of the Gila and Salt River Base and Meridian, in Maricopa County, Arizona; containing 280 acres more or less.

TO HAVE AND TO HOLD the aforesaid property, together with all and singular the appurtenances and privileges thereunto in anywise belonging or appertaining, and all the estate, right, title, interest and claim whatsoever, of the said party of the first part, in law and in equity, to the proper use, benefit and behoof of the said party of the second part, its successors and assigns forever.

IN WITNESS WHEREOF, the said party of the first part, pursuant to the authority given by resolution duly adopted by its Board of Directors at a meeting of said Board held on the 30th day of December, 1913, authorizing among other things the making of this conveyance, has caused these presents to be duly executed by its Vice-president and Secre-

tary, and its seal to be hereto affixed, this 31st day of December, 1913.

THE UNION BANK & TRUST COMPANY,

By JOHN P. ORME,

Its Vice-president.

[Seal]

Attest: A. H. KLEIN,

Its Secretary.

State of Arizona,

County of Maricopa,—ss.

Before me, I. J. Lipsvhn, a notary public in and for said county, Arizona State, on this day personally appeared John P. Orme and A. H. Klein, known to me to be the persons whose names are subscribed to the foregoing instrument, and as such vice-president and secretary respectively of the corporation described in the foregoing instrument, and as such vice-president and secretary acknowledged to me that they executed the same for said corporation, for the purposes and consideration therein expressed, as its free act and deed, and by each of them voluntarily executed.

Given under my hand and seal of office, this 31st day of December, A. D. 1913.

[Seal]

I. J. LIPSVHN,

Notary Public.

My Commission Expires 2/16/1916. [33]

Exhibit No. 5 [to Complaint—Assignment and Transfer].

KNOW ALL MEN BY THESE PRESENTS: That the undersigned, the Union Bank & Trust Company, a corporation of Phoenix, Arizona, for a valuable consideration to it paid by the Valley

Bank of Phoenix, a corporation of the same place, does hereby assign and transfer unto the said Valley Bank of Phoenix all its right, title and interest in and to that certain lease made between D. Nicholson and wife with the undersigned, dated the 2d day of June, 1909, and pertaining to the four rooms on the ground floor of the Nicholson Building, situated at No. 30 N. Center St., in the City of Phoenix, Arizona, and at present occupied by the undersigned as its banking offices.

TO HAVE AND TO HOLD the said lease and all rights, privileges and benefits thereunder and arising therefrom and subject to the payment of the accruing rent as specified in said lease.

IN WITNESS WHEREOF the said party of the first part, pursuant to the authority given by resolutions adopted by its board of directors at a meeting of said board held this 30th day of December, 1913, has caused these presents to be duly executed by its Vice-president and Secretary this 30th day of December, 1913.

THE UNION BANK & TRUST COMPANY,

By JOHN P. ORME,

Vice-president.

[Seal]

Attest: A. H. KLEIN,

Its Secretary.

State of Arizona,

County of Maricopa,—ss.

Before me, I. J. Lipsvhn, a notary public in and for said county, Arizona State, on this day personally appeared John P. Orme and A. H. Klein, known to me to be the persons whose names are sub-

scribed to the foregoing instrument as vice-president and secretary respectively of the corporation described in the foregoing instrument, and as such vice-president and secretary acknowledged to me that they executed the same for said corporation, for the purposes and consideration therein expressed, as its free act and deed, and by each of them voluntarily executed.

Given under my hand and seal of office, this 30th day of December, A. D. 1913.

[Seal]

I. J. LIPSVHN,
Notary Public.

My Commission Expires 2/16/1916. [34]

Exhibit No. 6 [to Complaint—Bill of Sale].

BILL OF SALE.

KNOW ALL MEN BY THESE PRESENTS: That the Union Bank & Trust Company, a corporation of Phoenix, Arizona, for and in consideration of the sum of one dollar and other valuable considerations to it in hand paid by the Valley Bank of Phoenix, a corporation of the same place, does by these presents bargain, sell and convey unto the said Valley Bank of Phoenix, its successors and assigns, all of the personal property mentioned and set forth in Schedule A hereto attached, which said schedule is made a part of this Bill of Sale.

TO HAVE AND TO HOLD the aforesaid property unto the said party of the second part, its successors and assigns forever, hereby agreeing to warrant and defend the sale of the said property, goods and chattels against all and every person or persons whomsoever lawfully claiming or to claim the same.

IN WITNESS WHEREOF the said party of the first part, pursuant to the authority given by resolutions adopted by its board of directors at a meeting of said board held this 30th day of December, 1913, has caused these presents to be duly executed by its Vice-President and Secretary this 30th day of December, 1913.

THE UNION BANK & TRUST COMPANY,
By JOHN P. ORME,
Vice-President.

[Seal]

Attest: A. H. KLEIN,
Secretary.

State of Arizona,
County of Maricopa,—ss.

Before me, I. J. Lipsvhn, a notary public in and for said county, Arizona State, on this day personally appeared John P. Orme and A. H. Klein, known to me to be the persons whose names are subscribed to the foregoing instrument as vice-president and secretary respectively of the corporation described in the foregoing instrument, and as such vice-president and secretary acknowledged to me that they executed the same for said corporation, for the purposes and consideration therein expressed, as [35] its free act and deed, and by each of them voluntarily executed.

Given under my hand and seal of office this 30th day of December, A. D. 1913.

[Seal]

I. J. LIPSVHN,
Notary Public.

My Commission Expires 2/16/1916. [36]

Exhibit No. 7 [to Complaint—Schedule of Furniture and Fixtures].

**SCHEDULE OF FURNITURE AND
FIXTURES.**

FURNITURE:

- 1 Large Directors Table. (Mahogany.)
- 1 Small Office Table. (Mahogany.)
- 3 Mahogany Roll Top Desks.
- 1 Mahogany Letter File and Stand.
- 12 Mahogany Arm Chairs.
- 1 Swivel Desk Chair with leather cushion.
(Mahogany.)
- 1 Swivel Desk Chair. (Mahogany.)
- 2 Rugs.
- 6 Cuspidors. (Brass.)
- 1 Pike Adding Machine No.185392.
- 1 Burroughs Adding Machine No. 146047, Size 9.
- 4 High Desk Stools.
- 1 Coin Changer.
- 1 Protectograph No. 68274, Model G.
- 1 Oscilating Electric Fan.
- 1 Brass Electric Desk Fan.
- 2 Mahogany Typewriter Desks.
- 2 Mahogany Typewriter Desk Chairs.
- 2 Straight Back Chairs. (Mahogany.)
- 1 Underwood Typewriter Model 3, 12 inch.
- 1 Remington Typewriter Model 10.
- 1 Case of 50 Safe Deposit Boxes in Vault.
- 1 Filing Cabinet and Case in Vault.
- 1 Chair in Vault.
- 1 Oak Standing Desk.

- 1 Mahogany Double Standing Desk.
- 1 Diebold Safe.
- 2 Stepladders.
- 1 Stove.
- 1 Settee in Lobby, with Leather Cushion.

FIXTURES:

Consisting of all counters, partitions, grills, cupboards, Cloak and Telephone Booths, Shelving, Doors, Curtains, Door to Vault, Electrical Fixtures, platforms, customers desks, mahogany wall clock.

Also any other fixtures or furniture that was used and owned by the Union Bank & Trust Company in conducting a banking business, located at the northwest intersection of Central Ave., and Broadway, known as the Nicholson Building, in the City of Phoenix, Ariz.

1 HUDSON ROADSTER AUTOMOBILE.

All of the above Furniture and Fixtures are the property of the Union Bank and Trust Company and are at present situated in its banking office in the aforesaid Nicholson Building in the City of Phoenix, Arizona, and the same together with the aforesaid automobile are the personal property referred to and intended to be conveyed by the foregoing Bill of Sale. [37]

Exhibit No. 8 [to Complaint—Assignment].

KNOW ALL MEN BY THESE PRESENTS that the undersigned, The Union Bank & Trust Company, a corporation of Phoenix, Arizona, for value received, does hereby assign, transfer and set over unto the Valley Bank of Phoenix, a corporation, of Phoenix, Arizona, these two certain indentures of

mortgage, more particularly described as follows, to wit:

1. Mortgage, dated the 25th day of February, 1913, executed by Mary B. Lewis to the Union Bank & Trust Company, the undersigned, to secure the payment of one certain note made by said mortgagor to said mortgagee, dated on said date, in the sum of \$2,000, with interest, which said mortgage is recorded in Book 3339 of Mortgages at page 171 thereof, County Records of Los Angeles County, State of California, and which said mortgage covers the following described premises:—Lot 313 in Burk's Golden Tract, in the City of Los Angeles, in the County of Los Angeles, and State of California.
and

2. Mortgage, dated the 25th day of February, 1913, executed by Mary B. Lewis to the Union Bank & Trust Company, the undersigned, to secure the payment of one promissory note made by said mortgagor to said mortgagee, dated on said date, in the sum of \$10,000.00, with interest, which said mortgage was recorded on the 5th day of March, 1913, in Book 3351 of Mortgages at page 42 thereof, County Records of Los Angeles County, State of California, and which mortgage covers the following described premises:—Lot 24 and the South half of Lot 23 in Block 20 of the Charles Victor Hall Tract, in the City of Los Angeles, Los Angeles County, State of California.

TO HAVE AND TO HOLD the above described mortgages, together with the respective debts and notes secured thereby, together with all rights, bene-

fits, privileges and moneys arising and to arise therefrom and thereunder, including the right to settle, compromise, release, sue for, collect, foreclose the [38] same or any part thereof, and to do any and everything necessary or proper in connection with the said mortgages and the debts thereby secured, to the same extent and to the same effect, as the undersigned might or could have done in the premises, had this assignment not been made; hereby giving and granting unto the said The Valley Bank of Phoenix, its successors and assigns full authority and right in the premises, to exercise full and complete ownership in and over said mortgages and the debts thereby secured, either in its own name or in the name of the undersigned, as said Valley Bank of Phoenix, may deem advisable or convenient, but at its own cost and expense.

IN WITNESS WHEREOF the said Union Bank & Trust Company, pursuant to the authority given by resolution duly adopted by its Board of Directors at a meeting of said Board held at its office in the City of Phoenix, Arizona, on the 30th day of December, 1913, has caused these presents to be duly executed in its name by its vice-President and Secretary, and its seal to be hereunto affixed, this 31st day of December, 1913.

THE UNION BANK & TRUST COMPANY.

By JOHN P. ORME,
Its Vice-President.

[Seal]

Attest: A. H. KLEIN,
Its Secretary.

State of Arizona,
County of Maricopa,—ss.

Before me, I. J. Lipsvhn, a notary public in and for said county, Arizona State, on this day personally appeared John P. Orme and A. H. Klein, known to me to be the persons whose names are subscribed to the foregoing instrument as vice-president and secretary respectively of the corporation described in the foregoing instrument, and as such vice-president and secretary acknowledged to me that they executed the same for said corporation, for the purposes and consideration therein expressed, as its free act and deed, and by each of them voluntarily executed.

Given under my hand and seal of office, this 31st day of December, A. D. 1913.

[Seal]

I. J. LIPSVHN,
Notary Public.

My Commission Expires 2/16/1916. [39]

Exhibit No. 9 [to Complaint—Assignment].

KNOW ALL MEN BY THESE PRESENTS that the undersigned, The Union Bank & Trust Company, a corporation of Phoenix, Arizona, for value received from the Valley Bank of Phoenix, a corporation of Phoenix, Arizona, does hereby assign, transfer and set over unto the said Valley Bank of Phoenix, all the right, title, interest, claim, demand, equity, benefits, privileges and moneys arising out of and to arise out of and collectible and receivable under and by virtue of that certain escrow and trust declaration made by The Los Angeles Trust and

Savings Bank, of Los Angeles, State of California, dated December 26, 1913, and which escrow and trust declaration relates to two certain notes executed by Seaborn Stone and Ida E. Stone to Clarence M. Libbey, one of said notes being for \$6,500 due one year from September 1st, 1912, and the other of said notes being for \$6,500 due 2 years from September 1st, 1912; and which escrow and declaration also relates to Certificate No. 92 for 65 shares of the preferred stock of the undersigned corporation, and also the matter of the disposition of the proceeds of said notes and the division of said shares of stock, as morefully appears and is set forth in said escrow and declaration.

It being the intention of this instrument to convey to the said Valley Bank of Phoenix, all the right, title and interest which the undersigned has in and to said notes, and the mortgages securing the payment of the same, and also in and to all rights and benefits accruing and arising from and under said escrow and declaration; hereby giving and granting and conveying to said Valley Bank of Phoenix, its successors and assigns all the rights and benefits which the undersigned would have and has in and to said notes, mortgages and escrow, had this assignment not have been made.

And the said Los Angeles Trust & Savings Bank is [40] hereby authorized, empowered and directed to pay over all moneys payable to the undersigned under and by virtue of the aforesaid escrow and trust declaration, to the said Valley Bank of Phoenix, its successors or assigns, and to deal with

said Valley Bank of Phoenix, its successors or assigns in connection with the said escrow and declaration and the matters therein referred to, the same as though the said Valley Bank of Phoenix had been the original party thereto in the place and stead of the undersigned.

IN WITNESS WHEREOF the said Union Bank & Trust Company, pursuant to the authority given by resolution duly adopted by its Board of Directors at a meeting of said Board held at its office in the City of Phoenix, Arizona, on the 30th day of December, 1913, has caused these presents to be duly executed in its name by its vice-President and Secretary, and its seal to be hereunto affixed, this 31st day of December, 1913.

THE UNION BANK & TRUST COMPANY.

By JOHN P. ORME,

Its Vice-President.

[Seal]

Attest: A. H. KLEIN,

Its Secretary.

State of Arizona,

County of Maricopa,—ss.

Before me, I. J. Lipsvhn, a notary public in and for said county, Arizona State, on this day personally appeared John P. Orme and A. H. Klein, known to me to be the persons whose names are subscribed to the foregoing instrument as vice-president and secretary respectively of the corporation described in the foregoing instrument, and as such vice-president and secretary acknowledged to me that they executed the same for said corporation for the purposes and consideration therein expressed, as its free

act and deed, and by each of them voluntarily executed.

Given under my hand and seal of office this 31st day of December, A. D. 1913.

[Seal]

I. J. LIPSVHN,
Notary Public.

My Commission Expires 2/16/1916. [41]

Exhibit No. 10 [to Complaint—Receipt].

Phoenix, Arizona, December 31, 1913.

RECEIVED of The Union Bank & Trust Company the following items transferred to us under and by virtue of that certain contract and agreement bearing date the 30th day of December, 1913; Road District Imp. No. 1, County of San Diego, State of Calif. Bonds Nos. 29 to 50, both inclusive, amounting at face value to \$7,123:50;

Notes as follows:

Richard Allen	\$261.00	
Consolidated Mines Co.	500.00	
J. R. Hughes.....	75.50	
J. R. Hughes.....	25.00	
J. R. Hughes.....	37.00	
H. F. Jordan.....	15.00	
F. H. Thompson.....	50.00	
Do.	100.00	
J. P. Cleaveland.....	4,184.76)	To be paid if the
Do.	3,260.00)	notes covering
		stock sales made
		by him for J. K.
		Tennant are not
		paid.
Mary B. Lewis) Add cost	2,000.00	(Secured by mort-
Do.) of Ins. \$55.00.	10,000.00	gage)
Ellen May Bernard	275.00	Balance
Anna & J. Lewis.....	121.40	Balance (Sec. by
		Mtge)
J. M. Phelps.....	337.53	Balance
Richard W. Bishoff.....	235.00	Balance

C. M. Cope.....	1,138.20	
W. S. Furman.....	150.00	Bank holds office furniture a/c chat. mtg. (SH)
Fred Young	200.00	Balance
Alexander Moore	36.00	
Lucinda Lewis	97.16	Balance

Insurance policy Phoenix Assurance Co., Ltd., No.
307619 favor Lucinda Lewis.

Insurance policies The Svea Insurance Co., Nos.
213713-4 in favor Mary B. Lewis.

Abstract of Title:

Part of Sec. 19 1 S. 4 W. Oscar C. Price.

Lot 25, Brown Holsinger tract.

N. W. $\frac{1}{4}$ N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ & S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$
of Sec. 34, C. M. Cope.

Lot 1 N. $\frac{1}{3}$ of Lot 3, Block 5, Grand Ave. Addn.,
W. T. Barkley.

Lot 7, Block 18, Collins Addition, J. A. Lewis.

S. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ Sec. 14, T. 1 N. R. 2, Wm. L.
Love.

Lot 9, Blk. 18, Collins Addn., Lucinda Lewis.

W. 168 ft. Lot B, Block 1 Railroad Place, Jos. C.
Green.

Lot 27, Block 24, Capitol Addition, Mrs. Eddy
Warranty deeds;

Union B. & T. Co. to Parker L. Wood, an. re-
corded.

Parker L. Woodman, Tr. to Union B. & T. Co.,
not recorded.

Margaret Pecks to W. T. Barkley.

Walter D. Sutter to Union B. & T. Co.

Contracts:

B. G. Pecks to Wm. L. Love.

B. G. Pecks to W. T. Barkley.

B. G. Pecks to Eva S. Eddy.

Received—THE VALLEY BANK OF PHOENIX,
By S. H. STUART,
Asst. Cashier. [42]

[Endorsements]: E-20. (Phoenix.) In the District Court of the United States, in and for the District of the State of Ariz., Western Underwriting & Mortgage Co., a Corporation, Complainant, vs. The Valley Bank of Phoenix, a Corporation, and The Union Bank & Trust Co., a Corporation, Defendants. Complaint. In Equity. Filed Mar. 5, 1914, at — M. George W. Lewis, Clerk. By Robert E. L. Webb, Deputy. Law Offices, Stone-man & Ling, 405, 406 and 407 Goodrich Block, Phoenix, Arizona. [43]

[Subpoena Ad Respondendum.]

UNITED STATES OF AMERICA.

*District Court of the United States, District of
Arizona.*

IN EQUITY.

The President of the United States, Greeting: To
The Valley Bank of Phoenix, a Corporation,
and The Union Bank & Trust Company, a Cor-
poration, Both Organized Existing and Doing
Business Under the Laws of the State of Ari-
zona.

YOU ARE HEREBY COMMANDED, That you
be and appear in said District Court of the United
States, District of Arizona, at the courtroom in

Phoenix, Arizona, twenty days from the date hereof, to answer a bill of complaint exhibited against you in said court by Western Underwriting & Mortgage Company, a corporation organized and existing under the laws of the State of California, and to do and receive what the said Court shall have considered in that behalf.

WITNESS, the Honorable WILLIAM H. SAWTELLE, Judge of said District Court, this 5th day of March, in the year of our Lord one thousand nine hundred and fourteen and of our Independence the 138.

[Seal]

GEORGE W. LEWIS,

Clerk.

By Robert E. L. Webb,

Deputy Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States.

YOU ARE HEREBY REQUIRED to file your answer or other defense in the above suit, on or before the twentieth day after service, excluding the day thereof, of this subpoena, of the clerk's office of said court, pursuant to said bill: otherwise the said bill may be taken *pro confesso*.

GEORGE W. LEWIS,

Clerk.

By Robert E. L. Webb,

Deputy Clerk. [44]

United States Marshal's Return.

Received this writ Mar. 7, 1914, at Phoenix, Arizona, and executed the same March 7, 1914, at Phoenix, Arizona, upon the within named defendant, the

Valley Bank of Phoenix, a corporation, by delivering a true and certified copy hereof, to which was attached a copy of the bill of complaint, to E. J. Bennett, personally, the said E. J. Bennett at the time being the president of the Valley Bank of Phoenix, corporation defendant.

At the same time and place I further executed this writ upon the within named defendant, the Union Bank & Trust Co., a corporation, by delivering a true and certified copy hereof, to which was attached a copy of the bill of complaint, to A. H. Klein, the said A. H. Klein at the time being the Secretary of the Union Bank & Trust Company, corporation defendant.

Return of this writ is made this 10th day of March, 1914, at Phoenix, Arizona.

J. P. DILLON,
U. S. Marshal,
By Chas. R. Price,
Deputy.

Marshal's fees for service upon two persons: \$8.00.

[Endorsed]: Docket No. 386. No. E-20 (Phoenix). U. S. District Court District of Arizona in Equity. Western Underwriting & Mortgage Co., Complainant, vs. The Valley Bank of Phoenix & The Union Bank & Trust Co. Defts. Subpoena *Ad Respondendum*. Filed Mar. 11, 1914, at — M. Geo. W. Lewis, Clerk. By R. E. L. Webb, Deputy.

*In the District Court of the United States in and for
the District of the State of Arizona.*

No.—E—20.

WESTERN UNDERWRITING & MORTGAGE
COMPANY, a Corporation organized and ex-
isting under the laws of the State of Califor-
nia,

Complainant,

vs.

THE VALLEY BANK OF PHOENIX, a Corpora-
tion, and THE UNION BANK & TRUST
COMPANY, a Corporation, both organized,
existing and doing business under the laws of
the State of Arizona,

Defendants.

Stipulation [of Facts].

IT IS HEREBY STIPULATED, by and between
George J. Stoneman, counsel for plaintiff above
named, and C. F. Ainsworth, solicitor for defendant,
The Valley Bank of Phoenix above named, that, sub-
ject to the reservations hereinafter set forth the fol-
lowing facts are admitted to be true without the ne-
cessity on the part of plaintiff of introducing proof
thereof:

I.

The execution by the parties named therein, of the
contract designated in plaintiff's complaint as ex-
hibit "A."

II.

The execution and delivery by the parties named

therein of the instrument designated in plaintiff's complaint as exhibit I.

III.

The execution and delivery of the quitclaim deed designated in plaintiff's complaint as exhibit 4.
[45]

IV.

The execution and delivery of that certain assignment designated in plaintiff's complaint as exhibit 5.

V.

The execution and delivery of that certain bill of sale designated in plaintiff's complaint as exhibit 6.

VI.

The receipt by the Valley Bank of the schedule of furniture and fixtures designated in plaintiff's complaint as exhibit 7.

VII.

The execution and delivery of that certain instrument designated in plaintiff's complaint as exhibit 8.

VIII.

The execution and delivery of that certain instrument designated in plaintiff's complaint as exhibit 9.

IX.

The execution and delivery of that certain instrument designated in plaintiff's complaint as exhibit 10.

The stipulations and admissions hereinabove mentioned are made subject to the distinct understanding that the defendants, the Valley Bank of Phoenix, reserves the right to claim that any or all of the assets mentioned in any of the instruments hereinabove designated as exhibits, were intended to be and were

transferred from the Union Bank & Trust Company to the Valley Bank of Phoenix under the provisions of the contract dated January 27th, 1912, and contemporaneous parol contracts claimed by the Valley Bank to have been entered into at the time of execution of the said contract on January 27th, 1912. [46]

GEORGE J. STONEMAN,
Attorney and Solicitor for Western Underwriting
Company.

C. F. AINSWORTH,
Attorney and Solicitor for the Valley Bank of
Phoenix

Dated this 16th day of January, 1915. [47]

[Endorsements]: No. E-20. In the District Court of the United States, in and for the District of the State of Arizona. Western Underwriting & Mortgage Company, a Corporation, organized and existing under the laws of the State of California, Complainant, vs. The Valley Bank of Phoenix, a Corporation, and The Union Bank & Trust Company, a Corporation, both organized, existing and doing business under the laws of the State of Arizona, Defendants. Stipulation. Filed Jan. 21, 1915. George W. Lewis, Clerk. Law Offices Stoneman, 405, 406 and 407, Goodrich Block, Phoenix, Arizona. [48]

*In the United States District Court for the District
of Arizona.*

Minute Entry Appearing Under Date of Friday,
January 22, 1915, at Phoenix, Arizona.

No. E-20.

WESTERN UNDERWRITING & MORTGAGE
CO.,

Plaintiff,

vs.

VALLEY BANK OF PHOENIX et al.,
Defendants.

Trial of this case is this day resumed, pursuant to an order of adjournment made on yesterday, all counsel on both sides being present, including counsel for the intervernor herein, the witness, Joseph S. Jenckes, being upon the stand for further examination. Plaintiff moves the Court for leave to amend its complaint on file herein by inserting after line 19 on page 15 of said complaint following the words: "to commence such suit," being the closing of paragraph 9 of the bill of complaint herein, to wit:

"Your orator further alleges that W. L. Rosa, hereinabove mentioned, was the owner of the majority of the common stock entitled to be voted at a stockholders meeting of the Union Bank & Trust Company prior to he bringing of this action on March 5th, 1914, for that notwithstanding the fact that prior to the bringing of this action, there appeared upon the stock transfer books of the Union Bank & Trust Company,

a record purporting to fix the ownership of 251 shares of the common stock of said Union Bank & Trust Company in the Western Underwriting & Mortgage Company, complainants herein. In truth and in fact, the Western Underwriting & Mortgage Company is the pledgee only of said 251 shares, which said shares of stock were, without authority of the Western Underwriting & Mortgage Company, and without consideration therefor, caused by one J. K. Tennant to be transferred from his name to the name of the Western Underwriting & Mortgage Company and that said shares of stock so purporting to be issued to the Western Underwriting & Mortgage Company were in truth and in fact the stock of the said J. K. Tennant, and were at said time and now are held by the Western Underwriting & Mortgage Company as security only for the payment of a note for \$40,000 given by the said J. K. Tennant to complainant here. [49]

“And your orator further alleges in this connection, that, since the date of the purported issuance of said stock to Western Underwriting & Mortgage Company, under the conditions hereinabove set forth, the said J. K. Tennant has at all times refused to vote said stock at any meeting of stockholders of the Union Bank & Trust Company.”

“Your orator further alleges that it would have been useless to appeal to the stockholders of the Union Bank & Trust Company to bring this action for the reason that under the articles

of incorporation of the said Union Bank & Trust Company and the laws of the State of Arizona, the stockholders of a corporation are without power to bring such an action acting as a body aggregate, or to compel the bringing of such action by the Board of Directors, any of its officers, or by anyone else.”

to which proposed amendment the defendants by counsel object, AND IT IS ORDERED that the said objection be and the same is hereby overruled; AND IT IS ORDERED that the plaintiff be permitted to amend its complaint as requested; and thereupon, the defendant ask that the further trial of this case be continued in order to give them time to procure necessary testimony; AND IT IS ORDERED that this case be continued until the April term of this court at Phoenix. [50]

[Answer of Valley Bank of Phoenix to Amended Complaint.]

In the District Court of the United States, District of Arizona, at Phoenix, Arizona.

No. E-20—(Phx.)

WESTERN UNDERWRITING AND MORTGAGE COMPANY, a Corporation, Organized and Existing Under the Laws of the State of California,

Complainant,

vs.

THE VALLEY BANK OF PHOENIX, a Corporation, and THE UNION BANK & TRUST

COMPANY, a Corporation, Both Organized and Existing and Doing Business Under the Laws of the State of Arizona,

Defendants.

Comes now the above-named defendant The Valley Bank of Phoenix, by C. F. Ainsworth, its attorney and solicitor, and for its answer to the amended complaint of the above-named complainant herein, respectfully shows and alleges:

1. It admits the allegations contained in paragraph marked "I" of the complaint herein.

2. It admits the allegations contained in paragraph marked "II" of the complaint herein.

3. It admits the allegations contained in paragraph marked "III" of the complaint herein.

4. It denies each and every of the allegations contained in paragraph marked "IV" of the complaint herein, except as herein expressly admitted; and this defendant further answering the allegations contained in said paragraph "IV" of the complaint herein, respectfully shows and alleges: [51]

That on the 27th day of January, 1912, and for some time prior thereto, the above-named defendant The Union Bank & Trust Company was financially embarrassed to such an extent as rendered it unable to meet its obligations and to further continue to carry on its banking business in so far as it related to the receiving of deposits of money and the withdrawal thereof by check or other order on it, as contemplated by its articles of incorporation and the laws of the State of Arizona, in such case made and

provided, and for the purpose of relieving itself of its obligations to promptly pay off and discharge its liabilities, and for the further purpose of preventing the closing of its doors by the bank comptroller of the State of Arizona, the said Union Bank & Trust Company and this defendant the Valley Bank of Phoenix, did enter into that certain contract and agreement referred to in said complaint herein and attached thereto as exhibit "A," to which contract and agreement reference is hereby made for a more complete description of the conditions and terms thereof; that simultaneously with the execution of said contract, and as part of the same transaction, this defendant and the said Union Bank & Trust Company entered into a verbal contract and agreement, wherein and whereby it was agreed and understood, that the said Union Bank & Trust Company should have the right, upon payment to this defendant of all moneys expended by this defendant under the terms of the aforesaid written contract (except such moneys as may have been repaid to it) to have all of the assets which were transferred to this defendant under the terms of the aforesaid contract of January 27th, 1912, (except such as may have been reduced to cash) returned to said Union Bank & Trust Company. And it was agreed at said time, that said written contract should not embody such verbal agreement aforesaid.

[52]

And this defendant further alleges and shows that while the said contract mentioned in said complaint herein and attached thereto as exhibit "A" provides that said assets therein referred to shall be and are

transferred to this defendant, absolutely, such transfer was made in that form in order to enable this defendant to more readily handle and collect such assets, in its own name.

This defendant further shows and expressly alleges that the said Union Bank & Trust Company, and this defendant understood and agreed at the time such transfer of said assets was made to this defendant, that such transfer of said assets was simply in the nature of a pledge for the repayment to this defendant of the moneys which this defendant should advance and pay out under the terms of the aforesaid written contract, with the added privilege however, of this defendant using and handling such assets in such manner as would reduce the same to cash as speedily as possible and advisable, and to apply the proceeds thereof towards the payment to this defendant of the moneys advanced and paid out by it under the terms of said written contract aforesaid.

And this defendant further alleges and shows that within a few days after the execution of the written contract of January 27th, 1912, aforesaid, this defendant and the said Union Bank & Trust Company, through its duly authorized officers entered into a parole agreement wherein and whereby the Union Bank & Trust Company, in consideration of its being permitted to use the banking furniture and fixtures and the premises theretofore used and occupied by it as a banking house in the City of Phoenix, Arizona, did agree to pay the rent to come due on said premises from time to time, and did further agree to proceed at once to reorganize said bank and

obtain new [53] assets for said company by the sale of shares of its capital stock and would use such portion of such new assets as might be necessary to pay off the amount of money expended and paid out by this defendant under the terms of the said contract of January 27th, 1912, aforesaid; and it was then and there further understood and agreed between said parties, that when the said Union Bank & Trust Company should pay to this defendant the full amount due this defendant for moneys expended and advanced and paid out by this defendant under the terms of said contract of January 27th, 1912, the said Union Bank & Trust Company should be thereupon entitled to a redelivery and return of all of the assets turned over to this defendant under said contract of January 27th, 1912, except such as had theretofore been reduced to cash and applied on the amount so expended by this defendant.

This defendant further shows and alleges that in pursuance of the agreements and understandings hereinabove referred to, both this defendant and the said Union Bank & Trust Company, ever since the making of said contract of January 27th, 1912, and up and until the making of the contract of December 30th, 1913, hereinafter referred to, treated and considered said assets so turned over to this defendant under the said contract of January 27th, 1912, as a pledge, and did also treat and consider the moneys so expended and paid out by this defendant under the terms of the said contract, as an indebtedness on the part of said Union Bank & Trust Company to this defendant, and did so carry said assets and said

indebtedness, on their respective account books, and said Union Bank & Trust Company did from time to time in its reports to the state auditor of the State of Arizona, report said assets as being held by this defendant for it, but subject to this defendant's claim thereto as security, and did report to said state auditor, as an indebtedness on its [54] part to this defendant, the amount claimed by this defendant for moneys paid by it and expended by it under the contract of January 27th, 1912, and not repaid to this defendant.

This defendant further alleges that said contract of January 27th, 1912, did not contain and it was not intended it should contain, any release or discharge on the part of this defendant to the said Union Bank & Trust Company, for any deficiency which may remain after the application of the proceeds derived from the assets so turned over to it by said Union Bank & Trust Company under the aforesaid contract of January 27th, 1912. That each and all of the persons and individuals who signed and subscribed the said contract, either as officers of the said Union Bank & Trust Company, or as sureties and guarantors, were at the time of such signing said contract, directors of said Union Bank & Trust Company.

This defendant further alleges, that pursuant to the requirements and terms of said contract of January 27th, 1912, it did pay off and discharge each and all of the debts and liabilities of the said Union Bank & Trust Company, as in said contract provided and referred to.

This defendant further alleges and shows to this

court that the persons mentioned and described in said complaint and contract, as the sureties for the said Union Bank & Trust Company, were not given by the terms of said contract, nor was it intended or contemplated that they should have, any interest in the assets so delivered and pledged with this defendant by said Union Bank & Trust Company under the terms of said contract, other than that which they as such sureties [55] and guarantors would have under the law, to subrogation to the rights of this defendant in and to the assets so turned over and delivered to this defendant under the aforesaid contract, remaining uncollected and unreduced to cash on the 27th day of January, 1915, and then only to the extent of the moneys which they should be compelled to pay this defendant as such sureties and guarantors under the terms of the aforesaid contract, as the deficiency remaining unpaid to this defendant by the Union Bank & Trust Company, after the application of all proceeds derived from the assets so turned over to this defendant under said contract, less the expenses and costs of collection, incurred in connection with such collection and reduction to cash. That except as aforesaid, the said sureties and guarantors mentioned in said contract of January 27th, 1912, did not have and do not now have any interest in or to any of the said assets.

This defendant further states and alleges, that the assets so turned over and delivered to it under the terms and conditions of said agreement and contract, by said Union Bank & Trust Company, while having a face value in excess of the admitted liabilities of

the said Union Bank & Trust Company at the time said contract was entered into and executed, were in fact of considerably less value than such admitted liabilities, and they were known to the said Union Bank & Trust Company and to the directors thereof, including each and all of said sureties and guarantors, to be of considerably less value than the admitted liabilities which were to be paid by this defendant under the terms of the aforesaid contract; and it was because of this knowledge on the part of all of the parties to said contract and agreement, that this defendant insisted upon, [56] and the said Union Bank & Trust Company agreed to furnish, the further security for the repayment of this defendant, by the contracts of the sureties and guarantors mentioned and referred to in said contract of January 27th, 1912, and who did in fact execute and sign said contract as such sureties and guarantors for such purpose and security, as more fully shown by said exhibit "A" attached to the complaint herein.

This defendant further answering the allegations of said paragraph "IV" of said complaint herein, contained on pages 6 and 7 and lines 1 to 8 on page 8 of said complaint, specifically denies that it has any knowledge or information sufficient to form a belief as to the truth thereof, and hereby specifically denies the same. And this defendant further specifically denies that the said Union Bank & Trust Company ever received any of the assets and things referred to in exhibit "B" attached to said complaint, from the plaintiff herein, and further specifically denies that this defendant ever received any part of said assets and things.

5. This defendant denies each and every of the allegations contained in paragraph marked "VI" of said complaint herein, except as hereinafter admitted. And this defendant further alleges, that in the month of May, 1913, and after this defendant had expended a large amount of money and time in connection with its efforts to reduce to cash said assets so turned over and delivered to it by said Union Bank & Trust Company under the aforesaid contract of January 27th, 1912, and after this defendant had from time to time rendered to said Union Bank & Trust Company at its requests, statements and accounts relative to the amount of moneys expended by [57] this defendant in behalf of said Union Bank & Trust Company, under the terms of the aforesaid contract, there was had an adjustment and statement of such account existing between the said Union Bank & Trust Company and this defendant in connection with the aforesaid contract of January 27th, 1912, at which adjustment and statement, it was found by both of the defendants hereto and the sureties and guarantors on said contract, that there still remained unpaid and owing to this defendant from the said Union Bank & Trust Company on account of such expenditures in its behalf by this defendant, after deducting all moneys collected theretofore by this defendant, the sum of \$164,432.46; and thereafter the said Union Bank & Trust Company carried this amount on its books, as the amount of the indebtedness to this defendant at the date of such adjustment and settlement, in the place and stead of the larger amount shown by its books theretofore;

and at the time of such adjustment or shortly thereafter, the note of the said Union Bank & Trust Company in the sum of \$164,432.46 payable and due on the 27th day of January, 1915, was given and delivered to this defendant by the said Union Bank & Trust Company, for the purpose and under the circumstances hereinafter more particularly stated and set forth.

This defendant further states and alleges, that at the time said note was so given and received by this defendant, said note was not and was never intended to, in any way or manner place this defendant in any better position than it was and had been prior to the execution and delivery of said note; and said note was not of any value to this defendant and was not intended to be of any value to this defendant, other than as evidence of the adjustment and settlement of all disputes to that date relative to the exact amount then due to this defendant [58] from the said Union Bank & Trust Company under said contract of January 27th, 1912.

This defendant further alleges and shows, that the aforesaid note was executed and delivered by said Union Bank & Trust Company, primarily for the purpose of complying with the demand and request of the bank comptroller of the State of Arizona, who objected to the manner and method in which the indebtedness owing to this defendant from the said Union Bank & Trust Company, under said contract, was carried on the books of the said Union Bank & Trust Company, and who stated that it was the duty of the Union Bank & Trust Company to indicate

on its books that such indebtedness to this defendant, under said contract of January 27th, 1912, was an absolute indebtedness on the part of this defendant, and should be determined and fixed and placed in the form of a written obligation preferably in the form of a note definitely fixing the amount of the obligation to this defendant; that pursuant to such request, said adjustment and settlement of account was had between the defendants hereto, whereby all of the parties to said contract of January 27th, 1912, determined and fixed and agreed upon said sum of \$164,432.46 as the amount of the indebtedness existing on the part of the Union Bank & Trust Company to this defendant, and the aforesaid note was then executed and delivered to this defendant as aforesaid, as evidence of the agreed amount of such indebtedness, and was so received by this defendant for such purpose and none other; that no change or modification of the relationship, rights or liabilities of the parties to said contract of January 27th, 1912, was in fact made, or intended to be made, by the execution and delivery of said note.

[59]

This defendant further states that said note is still held in the possession of this defendant, but that the same is and always has been of no value or consequence to this defendant, other than as evidence of the amount so found and determined to be due as aforesaid; and this defendant is willing and has been willing since the making and executing of the contract of December 30, 1913, hereinafter referred to, that said note be returned to said Union

Bank & Trust Company, or to this court, for such action in reference thereto as it may deem proper and expedient.

6. This defendant denies each and every allegation contained in paragraph marked "VII" of said complaint, except as hereinafter admitted; and this defendant further answering said allegations so contained in paragraph marked "VII" in said complaint,

Admits that on the the 30th day of December, 1913, the said Union Bank & Trust Company and this defendant entered into that certain contract, a copy of which is annexed to the complaint herein and marked exhibit "I"; that said contract was entered into because of and in view of the then existing indebtedness on the part of the said Union Bank & Trust Company to this defendant, and for the reasons specifically set forth and referred to in said contract, to which contract of December 30th, 1913, hereby refers and hereby makes the same a part of this its answer; that said contract was not entered into for any reason other than those specifically set forth in said contract, the existence of which reasons and the facts therein stated, this defendant specifically alleges to be true.

This defendant further alleges and states that at the [60] time of the execution of said contract of December 30th, 1913, the value of the assets theretofore turned over and delivered to it under the terms of the said contract of January 27th, 1912, and not theretofore reduced to cash, was considerably less than the amount of the indebtedness then exist-

ing on the part of the Union Bank & Trust Company to this defendant, and that such deficiency conservatively estimated aggregated the sum of \$75,000; that the value of the assets transferred to this defendant under the terms of the said contract of December 30th, 1913, was and is considerably less than said remaining unpaid indebtedness, and unless this defendant shall hereafter succeed in recovering from the sureties and guarantors mentioned in said contracts of January 27th, 1912, and December 30, 1913, the deficiency which now remains due and unpaid and owing, after applying all moneys collected by this defendant, on account of the moneys expended by this defendant in discharge of the admitted liabilities of the said Union Bank & Trust Company, aforesaid, and after applying all of the still remaining assets at present in the hands of this defendant, at a reasonable valuation, this defendant will still be the loser in a large sum of money, aggregating as this defendant conservatively estimates, the sum of at least \$30,000. That notwithstanding the situation as stated and set forth hereinabove, the said Union Bank & Trust Company and its stockholders are by virtue of the aforesaid contract of December 30th, 1913, released and relieved from any liability for such deficiency.

This defendant further states and alleges to this Court that since the amending of the complainant's bill herein, the term of the contract of January 27th, 1912, aforesaid, has expired, and under the terms thereof this defendant is entitled to be paid and reimbursed the deficiency remaining unpaid and [61]

collected by this defendant, after applying all moneys collected by this defendant on account of the moneys expended by this defendant on behalf of said Union Bank & Trust Company under the terms of the said contract of January 27th, 1912, which said deficiency was, on the said 27th day of January, 1915, at least the sum of \$79,774.97; that the assets and properties turned *over this* defendant by said Union Bank & Trust Company and still remaining in its hands unreduced to cash aggregate in value a sum considerably less than the aforesaid deficiency now due to this defendant from the said guarantors and sureties under the terms of said contract of January 27th, 1912.

And this defendant further alleges and respectfully calls to the attention of this Court, that the complainant herein attempts to allege and show to this Court, that under and by virtue of the contract of December 30th, 1913, there were transferred and turned over to this defendant each and all of the property, assets and things set forth in Exhibits 1, 2, 3, 4, 5, 6, 7, 8, and 9, attached to the complaint herein, when in truth and in fact the greater portion of said assets and things so mentioned and referred to in said exhibits were in fact turned over and delivered to this defendant under the contract of January 27th 1912 including all of the office furniture and equipment of the banking institution of said Union Bank & Trust Company, although no formal bill or sale therefor was executed to this defendant until some time later; and that only a portion of the assets referred to in said exhibits 2 to 9 inclusive were

in fact turned over to this defendant under the contract of December 30th, 1913.

And this defendant further specifically denies that [62] this defendant ever did receive any of the assets or things which the plaintiff alleges and states it delivered to the said defendant the Union Bank & Trust Company in return for preferred stock alleged to have been purchased by the plaintiff from the said Union Bank & Trust Company, and specifically denies that it received any of the assets or things which the plaintiff alleges it delivered or transferred to the said Union Bank & Trust Company for any purpose or by reason of or in connection with any transaction heretofore had between the said plaintiff and the said Union Bank & Trust Company.

7. This defendant denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph marked "VIII" in said complaint and therefore hereby denies the same.

8. Denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph marked "IX" in said complaint, and therefore denies the same. And this defendant further states and shows to this Court that the books and records of the said defendant the Union Bank & Trust Company show that the said plaintiff herein is the record owner of 251 shares of the common stock of said Union Bank & Trust Company, which said 251 shares of said common stock constitute a majority of the outstanding and

issued common stock of the said Union Bank & Trust Company, at the time this action was commenced, and said record further shows that the plaintiff herein was at the time of the commencement of this action, and was for some time prior thereto, the owner of said shares and of a majority of the outstanding stock of said defendant the Union Bank & Trust Company, and could have voted [63] said majority shares of said capital stock at the meetings of the stockholders of said Union Bank & Trust Company held subsequent to the making of the contract of December 30th, 1913; that for some time prior to the commencement of this action and subsequent to the making of the contract of December 30th, 1913, aforesaid, the said plaintiff herein, through its officers and representatives, claimed the ownership of said 251 shares of the capital stock of said Union Bank & Trust Company and asserted the right to exercise and enjoy the powers and rights incident to such ownership.

9. Denies the allegations contained in paragraph marked "X" in said complaint herein.

WHEREFORE This defendant having fully answered said amended complaint herein, prays the judgment of this Court that said plaintiff herein take nothing by its action herein; that this defendant go hence with its costs and disbursements herein incurred, and that it have such other and further relief, judgment and orders herein, as in the judgment of this Court may be proper, just and equitable.

C. F. AINSWORTH,

Attorney and Solicitor for the Defendant The Valley Bank of Phoenix. [64]

[Endorsements]: No. E—20 (Phx.) District Court of the U. S. District of Arizona, at Phoenix, Arizona. Western Underwriting & Mortgage Co. vs. Valley Bank of Phoenix, and Union Bank & Trust Company, Defendants. Answer of Valley Bank of Phoenix to Amended Complaint. C. F. Ainsworth, Atty. and Solicitor for Valley Bank of Phoenix. Service of Copy of within Answer to Amended Complaint admitted this 23d day of Feby., 1915. George J. Stoneman, Atty. for Complainant. Filed Feb. 23, 1915, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [65]

*In the District Court of the United States in and for
the District of the State of Arizona.*

No. E-20.

WESTERN UNDERWRITING & MORTGAGE
COMPANY, a Corporation, Organized and
Existing Under the Laws of the State of
California,

Complainant,

THE VALLEY BANK OF PHOENIX, a Corpo-
ration, and THE UNION BANK & TRUST
COMPANY, a Corporation, Both Organized,
Existing and Doing Business Under the Laws
of the State of Arizona,

Defendants.

Motion to Strike.

Comes now Western Underwriting and Mortgage Company, a corporation, complainant above named, by George J. Stoneman, E. J. Henning and Reese H. Ling, its solicitors, and moves to strike from the amended answer filed by Valley Bank of Phoenix one of defendants above named to the amended bill of complaint, all that portion of said amended answer as follows, to wit:

1. All that portion of said amended answer commencing with the word "that simultaneously" in folio 18, page 2, to and including folio 31 on said page, and folios 1 to 32 on page 3; 1 to 32 on page 4 and 1 to and including the words "January 27th, 1912" in folio 12 of page 5;

2. All of folio 21 to 31 inclusive on page 7; folios 1 to 31 inclusive on page 8 and folios 1 to and including the words "and none other" folio 27 on page 9;

3. The words "other than as evidence of the amount so found and determined to be due as aforesaid" in folios 4 and 5, [66] page 10.

4. All of the words commencing with the words "that said contract," folio 21, and ending with the word "true" folio 29, page 10;

5. All of the words in folios 27 to 31 inclusive on page 11 and folios 1 to 11 inclusive on page 12;

This motion is based upon the following grounds, to wit:

That the allegations in said portion of said amended answer so contained and above designated

are not sufficient in law to constitute a defense to this action in this, to wit:

That it is attempted by said defendant to plead a parol contract and to rely upon the terms of a parol contract for the purpose of altering the terms of the written contract, admitted by said defendant to exist;

That the alleged facts attempted to be pleaded are without sufficient or any allegation of any new or other consideration than the consideration set forth in the written contract of January 27th, 1912, admitted by defendant to have been executed and if permitted to be pleaded and relied upon as a defense by defendant will make entirely ineffective the terms of the admitted written contract of January 27th, 1912, in that it is admitted by said defendant to rest its defense in this action upon the existence and terms of an admitted written contract and in so far as complainant is concerned also upon the terms of a secret and undisclosed parol contract, alleged to have been entered into without sufficient or any consideration, for the purpose of changing, altering or modifying the terms of the admitted written contract, for all of which reasons and for other and further grounds of this motion, [67] complainant respectfully submits that no evidence under the terms of said alleged parol contract pleaded in said defendant's amended answer may be admitted.

GEORGE J. STONEMAN,

E. J. HENNING,

REESE M. LING,

Attorneys and Solicitors for Western Underwriting
and Mortgage Company.

Dated this twenty-second day of March, 1915.

Service of copy of attached notice and above motion accepted this twenty-second day of March, 1915.

C. F. AINSWORTH,
Solicitor for Valley Bank of Phoenix. [68]

*In the District Court of the United States in and for
the District of the State of Arizona.*

No. E-20.

WESTERN UNDERWRITING & MORTGAGE
COMPANY, a Corporation, Organized and
Existing Under the Laws of the State of
California,

Complainant,

vs.

THE VALLEY BANK OF PHOENIX, a Corpo-
ration, and THE UNION BANK & TRUST
COMPANY, a Corporation, Both Organized,
Existing and Doing Business Under the Laws
of the State of Arizona,

Defendants.

Notice [of Motion to Strike].

To the Valley Bank of Phoenix, and Mr. C. F. Ainsworth, Its Attorney and Solicitor:

You, and each of you are hereby notified that on Monday, the 5th day of April, 1915, at the hour of 10 o'clock A. M., or as soon thereafter as counsel may be heard, Western Underwriting and Mortgage Company, complainant, above named, will submit to the above-entitled court, for its determination, a motion to strike certain portions of the amended

answer to complainant's amended bill, as designated in the motion filed in the above-entitled court, a copy of which is annexed hereto for your information.

GEORGE J. STONEMAN,

E. J. HENNING,

REESE M. LING,

Attorneys and Solicitors for Western Underwriting
& Mortgage Company.

Dated this twenty-second day of March, 1915.

[69]

[Endorsements]: No. E—20. In the District Court of the United States in and for the District of the State of Arizona. Western Underwriting & Mortgage Company, a Corporation, Organized and Existing under the Laws of the State of California, Complainant, vs. the Valley Bank of Phoenix, a Corporation, and the Union Bank & Trust Company, a Corporation, both Organized, Existing and Doing Business under the Laws of the State of Arizona, Defendants. Motion to Strike. Filed Mar. 23, 1915. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. Law Offices, Stoneman & Ling, 405, 406 and 407 Goodrich Block, Phoenix, Arizona. [70]

*In the United States District Court for the District
of Arizona.*

Minute Entry Appearing Under Date of Wednesday,
April 14, 1915, at Phoenix, Arizona.

No. E—20.

WESTERN UNDERWRITING & MORTGAGE
CO.,

Plaintiff,

vs.

VALLEY BANK OF PHOENIX,

Defendant.

Minutes, April 14, 1915, Rehearing.

This cause came on for hearing this day before the Court sitting without a jury, the plaintiff being represented by George J. Stoneman, Esquire, and E. J. Henning, Esquire, its attorneys and the defendant, the Valley Bank of Phoenix, appearing by C. F. Ainsworth, Esquire, and E. J. Bennett, Esquire, its attorneys. The plaintiff to maintain upon its part the issue herein, calls S. H. Stewart as a witness upon behalf of the plaintiff, who is sworn, examined and cross-examined. G. G. Smith is called as a witness upon behalf of the plaintiff, sworn, examined and cross-examined. Plaintiff's Exhibit "A," offered in evidence, is admitted as to the note and same is read into the record but not filed and admitted as to the certificate of stock, read into the record but not filed. Plaintiff's Exhibit "B" is admitted in evidence, and read into the record but not

filed. Plaintiff's Exhibit "C" offered in evidence, is excluded and not filed. Joseph S. Jenckes, and E. J. Henning are called as witnesses upon behalf of the plaintiff, sworn, examined and cross-examined. Thereupon, the plaintiff, having reserved the right to introduce certain books and papers in evidence on its behalf upon the arrival of same from California, rests its case.

Thereupon, the defendant by counsel moves the Court to dismiss this cause for the reason that the plaintiff has failed to make out a case on the pleadings and evidence adduced, [71] which motion is resisted by the plaintiff, is argued by counsel and submitted to the Court and, upon consideration thereof by the Court, said motion is sustained by the Court; **AND IT IS ORDERED** that the case be dismissed and that judgment be entered in favor of the defendants, to which ruling and action of the Court, the plaintiff, by counsel, excepts and gives notice of appeal to the Circuit Court of Appeals of the United States for the 9th Circuit from the order sustaining the said motion to dismiss and order of judgment to be entered in favor of the defendants. [72]

*In the United States District Court for the District
of Arizona.*

Minute Entry Appearing Under Date of Tuesday,
April 13th, 1915, at Phoenix, Arizona.

No. E—20.

WESTERN UNDERWRITING & MORTGAGE
CO.,

Plaintiff,

vs.

VALLEY BANK OF PHOENIX et al.,
Defendants.

Order Denying Motion to Strike, etc.

The motion of the plaintiff to strike from the defendants' answer certain portions thereof having been argued by counsel on yesterday and submitted to the Court for its decision thereon, upon consideration thereof by the Court, IT IS ORDERED that the said motion be and the same is hereby denied to which ruling and action of the Court the plaintiff by counsel excepts.

AND IT IS ORDERED that this case be set down for hearing on April 14, 1915, at the hour of 9:30 o'clock, A. M. [73]

Judgment.

*In the District Court of the United States, District
of Arizona, at Phoenix, Arizona.*

No. E—20.

WESTERN UNDERWRITING & MORTGAGE
COMPANY, a Corporation Organized and
Existing Under the Laws of the State of Cali-
fornia,

Complainant,

vs.

THE VALLEY BANK OF PHOENIX, a Corpo-
ration, and THE UNION BANK & TRUST
COMPANY, a Corporation, Both Organized
and Existing and Doing Business Under the
Laws of the State of Arizona,

Defendants,

The above-entitled action coming on fully to be
tried before the above Court, the Hon. William H.
Sawtelle, presiding without a jury, on the 14th day
of April, 1915, the complainant appearing by George
J. Stoneman, Esq., attorney and solicitor, and E. J.
Henning, Esq., attorney and solicitor; and the de-
fendant The Valley Bank of Phoenix, appearing by
C. F. Ainsworth, Esq., its attorney and solicitor,
and the defendant The Union Bank & Trust Com-
pany appearing by Struckmeyer & Jenckes, Esqs., its
attorneys and solicitors;

And the said plaintiff having duly submitted to
this court its evidence and testimony in support of

the allegations of its complaint herein, and having duly rested its case,

And the defendant The Valley Bank of Phoenix having by its attorney and solicitor duly moved this Court for the dismissal of the said action, for the reason that the said plaintiff herein had failed to establish the allegations of said complaint herein, and that the evidence and testimony submitted by said plaintiff was not sufficient to sustain the allegations of its complaint nor to entitle it to any relief as against the said defendant, The Valley Bank of Phoenix, [74]

And it appearing to the satisfaction of this Court that the evidence and testimony submitted by the plaintiff was not sufficient to support the allegations of its complaint nor to entitle it to any relief as against the defendant The Valley Bank of Phoenix, and that the motion to dismiss made by said defendant The Valley Bank of Phoenix, should be granted,

NOW, THEREFORE, IT IS BY THE COURT CONSIDERED, ORDERED AND ADJUDGED, that the complaint herein, be and the same is hereby dismissed, and that the plaintiff take nothing by its said action;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant the Valley Bank of Phoenix, have and recover of and from the plaintiff the Western Underwriting & Mortgage Company its costs and disbursements herein, hereby taxed and allowed in the sum of \$81.00, and that said defendant have execution therefor.

Dated this 14th day of April, 1915.

WM. H. SAWTELLE,
Judge of the District Court of the United States, in
and for the District of Arizona.

[Endorsements]: District Court of the United States, District of Arizona, at Phoenix, Arizona. No. E—20. Western Underwriting & Mortgage Company, Plff., vs. The Valley Bank of Phoenix and The Union Bank & Trust Company, Defts. Judgment to Dismiss Action and for Costs in Favor of Defendant, The Valley Bank of Phoenix. C. F. Ainsworth, Attorney for Deft., Valley Bank of Phoenix, Phoenix, Arizona. Filed April 20, 1915. George W. Lewis, Clerk. [75]

[Order Granting Motion to Vacate Notice of Appeal.]

In the United States District Court for the District of Arizona.

Minute Entry Appearing Under Date of September 20th, 1915, at Phoenix, Arizona.

WESTERN UNDERWRITING & MORTGAGE
CO.,

Plaintiff,

vs.

THE VALLEY BANK OF PHOENIX et al.,
Defendants.

And now comes George J. Stoneman, Esquire, Solicitor for the Western Underwriting & Mortgage Company, and moves that the notice of appeal to the

Circuit Court of Appeals for the Ninth Circuit, from the order granting the motion to dismiss plaintiff's bill of complaint and from the judgment and decree entered thereon, be vacated for the purpose of permitted the filing of a petition for allowance of appeal, accompanied by assignment of errors, which motion to vacate is by the Court this day granted. [76]

*In the United States District Court for the District
of Arizona.*

WESTERN UNDERWRITING & MORTGAGE
COMPANY, a Corporation Organized and
Existing Under the Laws of the State of Cali-
fornia,

Complainant,

vs.

THE VALLEY BANK OF PHOENIX, a Corpo-
ration, and THE UNION BANK & TRUST
COMPANY, a Corporation, Both Organized,
Existing and Doing Business Under the Laws
of the State of Arizona,

Defendants,

**Petition for Appeal from the Order Dated April 14th,
1915, in the District Court of the United States,
for the District of Arizona.**

To the Honorable WILLIAM H. SAWTELL,
Judge of the District Court of the United
States, for the District of Arizona:

The above-named complainant feeling itself ag-
grieved by the decree made and entered in this cause

on the 14th day of April, 1915, does hereby appeal from said decree to the Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and it prays that its appeal be allowed, and that a citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, sitting at San Francisco;

That your petitioner further prays that the proper order touching the security to be required of it [77] to perfect its appeal be made.

GEORGE J. STONEMAN.

E. J. HENNING.

REESE M. LING.

C. A. McGEE.

A. J. MORGANSTERN.

E. E. HENDEE.

[Order Granting Petition and Allowing Appeal.]

The above petition is granted and the appeal allowed upon giving bond conditioned as required by law, in the sum of Five Hundred Dollars.

WM. H. SAWTELLE,
Judge.

Dated at Tucson, Arizona, October 2, 1915.

[Endorsements]: No. E-20. In the United States District Court, for the District of Arizona. Western Underwriting & Mortgage Company, a Corporation, Complainant, vs. The Valley Bank of Phoenix, a Corporation, et al., Defendants. Petition for Appeal from the Order dated April 14, 1915, in the Dis-

trict Court of the United States, for the District of Arizona. George J. Stoneman, Atty. for Complainant, 407 Goodrich Bldg., Phoenix, Arizona. Filed Sept. 20, 1915. George W. Lewis, Clerk. [78]

*In the United States District Court, for the District
of Arizona.*

WESTERN UNDERWRITING & MORTGAGE
COMPANY, a Corporation Organized and
Existing Under the Laws of the State of Cali-
fornia,

Complainant,

vs.

THE VALLEY BANK OF PHOENIX, a Corpora-
tion, and THE UNION BANK & TRUST
COMPANY, a Corporation, Both Organized,
Existing and Doing Business Under the Laws
of the State of Arizona,

Defendants.

Stipulation [as to Abstract of Evidence].

IT IS HEREBY STIPULATED, that the abstract of the evidence attached to and made a part of the assignment of errors filed in the above-entitled cause in the above-entitled court on September 20th, 1915, is, with the corrections and additions on the pages hereto attached, a full, true and correct abstract of all of the evidence submitted in said cause, and consent is hereby given to substitute originals of the pages showing corrections and additions hereto attached, for corresponding pages in

the original assignment of errors so filed.

C. F. AINSWORTH,

Solicitor for Valley Bank of Phoenix.

GEORGE J. STONEMAN,

Of Counsel for Western Underwriting & Mortgage Company.

Dated at Phoenix, Arizona, September 22d, 1915.

[79]

it to this note? A. Yes, sir.

(By Mr. AINSWORTH.)

The WITNESS.—Since last August, 1914, I have been secretary and manager of the Underwriting Company. I was not connected with this company in 1913. My knowledge of this transaction is not necessarily based on what the company told me. I attended several meetings and also directors' meetings in 1913. I was not present at the time this note was given. I was at a conference afterwards; the matter was talked over. My knowledge is not derived altogether from something told me afterwards. After the note was executed, I was told what happened. I based my evidence from the records of the corporation.

By Mr. AINSWORTH.—Then we object to it, as the records are the best evidence.

By Mr. STONEMAN.—Q. Did you have any talks with Mr. Tenant himself?

A. Yes, sir, and every member of the board that was present when it was made. I talked just prior to March 5th, 1913, when this suit was filed, and just prior to the time this note was given, and afterwards I talked with Mr. Tennant himself. Tennant merely

settled the suit with the Underwriting Company, which the Underwriting Company brought against him for Sixty-five Thousand (\$65,000.00) Dollars. I was present at a couple of conferences before the settlement. I saw the pleading in the suit. I knew the suit was filed and I was in Los Angeles when it was filed.

By Mr. AINSWORTH.—We object to what Mr. Tennant said about it after the suit was filed. It is hearsay; it is simply a statement of past transactions and hearsay.

By the COURT.—I will admit it subject to the objection of defendant. I may exclude it later on.

By the WITNESS.—He spoke regarding this stock several [80*—23†]

time he told me he was going to sell it and make a nice profit for himself and the company was a fool to let him have it. The Western Underwriting Company has never considered the stock as theirs. The collateral was not sold because we would have to have a judgment before we could sell it.

By the COURT.—When did you file your suit?

A. Mr. Henning could tell you more about that than I can.

By Mr. HENNING.—The answer was made October 14. I might say to Mr. Ainsworth that I have here a correct copy of the answer, and would be very glad to let him have it, and very glad to have it offered in evidence.

By Mr. AINSWORTH.—Did you say you have

*Page-number appearing at foot of page of original certified Record.

†Original page-number of Stipulation as to Abstract of Evidence as same appears in Original Certified Transcript of Record.

not exercised any rights of ownership since the note was given?

A. Well, there never has been any acts in the minutes regarding this at all, and none since I have been in the office since August, 1914. This note was given in September, 1913. The minutes would show whether they exercised any rights of ownership prior to the time I went in.

Q. Then you do not know of your own knowledge whether they tried to sell it or anything like that?

A. They could not sell it.

Q. Why not—because it did not stand in their name?

A. Why, I could not sell a horse just because it was in my barn.

Q. Didn't they endorse it?

A. Yes, sir. [81—26]

the matter in your Honor's own judgment, and shall be satisfied with your judgment.

By the COURT.—I do not like to rule at this time that I think the evidence is sufficient, but while I realize the embarrassment that comes to a lawyer when he is called upon to testify, the exigencies of the case seem to require it, and it is entirely proper for him to do so.

Mr. STONEMAN.—We thank your Honor for the consideration and I will call Mr. Henning.

E. J. HENNING was called as a witness on behalf of plaintiff, and being first duly sworn, testified as follows:

I and my firm have been for some time past counsel for Western Underwriting & Mortgage Company, a corporation in San Diego. I am acquainted with

J. K. Tennant, and also with Judge Trask, of Los Angeles, who is now dead. Judge Trask at the time I knew him at different times was attorney for J. K. Tennant. Based upon statements made to me, Tennant would have refused to vote any stock or vote this stock, had he been requested as a stockholder to bring this action.

By Mr. AINSWORTH.—Objected to as hearsay.

By the COURT.—Objection overruled.

Before the annual meeting of the Union Bank & Trust Company in January, 1914, Judge Trask was at that time counsel for and representing Mr. Tennant in this matter. Just prior to that he appeared for Tennant in the suit we brought against Tennant, which, however, had been settled, Judge Trask represented Tennant in the settlement, which resulted in this forty thousand dollar note to which the stock certificate is attached. Judge Trask called me on the 'phone and stated the Western Underwriting & Mortgage Company had failed to carry out its agreement with him and Mr. Tennant; that this stock certificate for 251 shares of Union Bank & Trust Company was to be transferred on the [82—32]

upon all of its stockholders? Had they not the right to construe that contract as it was intended to be, as it was, or as they expected it to be? I am referring to the written contract of December 30th, 1913, which treats the contract of January 27th, 1912, as a security for debt and not as an absolute sale as the instrument itself seems to make it.

By Mr. STONEMAN.—Yes?

By the COURT.—Now, then, upon that, and with-

out considering the question of whether contemporaneous with the contract of January 27th, 1913, there was a parol agreement between these parties, which they had the right, it seems to me, to recognize at the time they entered into the contract of December 30th, I say are you not bound by the construction which the corporation itself, for whom you sue, placed upon it?

By Mr. STONEMAN.—I do not believe so if it can be determined from the contracts that it was void for absolute want of consideration.

By the COURT.—Isn't that a defensive matter? You cannot presume there was a want of consideration, can you?

By Mr. STONEMAN.—Suppose, if your Honor please, that Mr. Henning told me that I owed him eight hundred sacks of grain, and under a misconception of the facts, I had paid him eight hundred sacks of grain and had turned them over to him, and it turned out afterwards that I didn't owe him but three hundred sacks of grain. Now, I certainly would have the right to sue Mr. Henning for that five hundred sacks. Now, if this board of directors, under the mistaken idea that they might construe the contract of January 27th so that an indebtedness was admitted to exist from the Union Bank to the Valley Bank of seventy-five or eight thousand dollars, executed a new contract, it would not mean that a stockholder was [83—40] bound by their mistake, providing that you could look to the contracts themselves and found that there could have existed no indebtedness. It is susceptible of only one con-

struction. I say that this contract is a sale on its face, and there is, in the answer, no transaction between the Valley Bank and the Union Bank which could have given rise, between January, 1912, and December, 1913, any indebtedness between the Union Bank and the Valley Bank. Their dealings ceased on January 27th, 1912. Now, if the Union Bank, then, we speaking for the Union Bank, cannot go to the Valley Bank and say to the Valley Bank, "You have taken from us \$75,000 worth of assets which you have not any right to take," or according to the testimony here, something like \$33,000 worth; "you had no right to take it; there was no consideration for it." We submit this contract for your consideration from which you can see that we do not owe it to you, and we want it back."

By the COURT.—And you admit that it did not exist?

By Mr. STONEMAN.—If your Honor please, are we bound because we have admitted something which could not exist?

By the COURT.—You have admitted it by your contract of December 30th, have you not?

By Mr. STONEMAN.—I suppose we have in so far as there was any authority to admit it; I am speaking as the Union Bank and not as the stockholder.

By the COURT.—Now, then, if that be true, if you have admitted it, how can you ask the Court to assume that there was no consideration for that admission?

By Mr. STONEMAN.—Because we have come into

court and shown the Court that there was a mistake and shown the Court that the consideration could not have existed with the [84—41] proof out of their own mouths. We think it is up to them to establish the validity of the parol contract, and when they attempt to do that, we submit the rule that they cannot introduce such evidence for the parol contract to qualify the terms of a written contract.

By the COURT.—Now, let us see. On December 30th, you say that you—I am reading from page 2 of exhibit one, you said that you were indebted—that you executed a note for \$164,000 on the 17th day of May, 1913, and that there remains due upon this note approximately \$75,000.00.

(Discussion.)

By the COURT.—It seems to me from the discussion that was had when the demurrers were argued, or rather the motion to strike was argued, the construction and the opinion that I got at that time, from the reading of the contract originally entered into, the one of January 27th, 1912, that it might well be construed as the parties afterwards did construe it, that is to mean a security for a debt. It is most unusual for a person who buys property, notes and securities outright, to take one as a guarantee for them guaranteeing the purchaser against loss, and it seems to me, if this case were to proceed, that the defendant would be allowed to introduce

[Endorsements]: No. E-20. In the United States District Court, for the District of Arizona. *Western Underwriting & Mortgage Co., Complainant, vs. The Valley Bank of Phoenix, a Corporation, et al.,*

Defendants. Stipulation. George J. Stoneman, Solicitor for Complainant, 407 Goodrich Bldg., Phoenix, Arizona. Filed Oct. 1, 1915, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [85—42]

*In the District Court of the United States for the
District of Arizona.*

WESTERN UNDERWRITING & MORTGAGE
COMPANY, a Corporation,

Appellant,

vs.

THE VALLEY BANK OF PHOENIX, a Corpora-
tion, and THE UNION BANK & TRUST
COMPANY, a Corporation,

Appellees.

Praecipe for Transcript of Record.

To the Clerk of the United States District Court in
and for the District of Arizona:

You will please prepare a transcript of record in
the above-entitled case, to be filed in the office of
the clerk of the United States Circuit Court of Ap-
peal for the Ninth Judicial District upon an appeal
to be perfected to said Court in said case, including
in such transcript the following proceedings, plead-
ings, papers, records and files, to wit:

1. Bill of complaint as amended by leave of Court
during trial.

2. Second amended answer of defendant, The
Valley Bank of Phoenix.

3. Process.

4. Return of service of process.
5. Motion to strike portions of amended answer referred to in said motion.
6. Stipulation admitting certain allegations of the bill of complaint.
7. Judgment and decree of the Court.
8. Minute entries.
 - (a) Showing leave to amend bill of complaint during trial.
 - (b) Ruling of Court denying motion to strike.
 - (c) Motion to dismiss bill of complaint. [86]
 - (d) Order of Court granting motion to dismiss bill of complaint.
 - (e) Exceptions- taken and allowed by complainant to denial of motion to strike and to order granting motion to dismiss bill of complaint.

~~This stipulation-~~

9. Assignment of errors.
10. Stipulation permitting amendment of assignment of errors.
11. Allowance of appeal.
12. Bond on appeal.
13. Certificate of clerk.

GEORGE J. STONEMAN,

Solicitor for Western Underwriting & Mortgage Company.

Dated at Phoenix, Arizona, October 4th, 1915.

[Endorsements]: No. E-20 (Phx.) In the District Court of the United States for the District of Arizona. Western Underwriting & Mortgage Com-

pany, a Corporation, Appellant, vs. The Valley Bank of Phoenix, a Corporation, and The Union Bank & Trust Company, a Corporation, Appellees. Praecipe for Transcript of Record. Filed Oct. 4, 1915, at —M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.
[87]

*In the District Court of the United States for the
District of Arizona.*

WESTERN UNDERWRITING & MORTGAGE
COMPANY, a Corporation,
Appellant,

vs.

THE VALLEY BANK OF PHOENIX, a Corpora-
tion, and THE UNION BANK & TRUST
COMPANY, a Corporation,
Appellees.

Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, Western Underwriting & Mortgage Com-
pany, a corporation, as principal, and The United
States Fidelity & Guarantee Company, a corpora-
tion, duly registered in the above-entitled court and
authorized to act in the capacity herein set forth as
surety, acknowledge ourselves to be jointly indebted
to The Valley Bank of Phoenix, a corporation, and
The United Bank & Trust Company, a corporation,
appellees in the above-entitled cause, in the sum of
Five Hundred Dollars (\$500.00) conditioned that;

WHEREAS, on the 14th day of April, A. D. 1915,
in the District Court of the United States for the

District of Arizona, in a suit pending in that court, wherein the Western Underwriting & Mortgage Company, a corporation, was plaintiff, and The Valley Bank of Phoenix and The Union Bank & Trust Company, both corporations, were defendants, numbered in equity docketed as No. E-20, a decree was rendered against the said Western Underwriting & Mortgage Company; and the said Western Underwriting & Mortgage Company, having been allowed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit and filed a copy thereof in the office of the clerk of the court to reverse the said decree and a citation directed to the said The Valley Bank of Phoenix and The Union Bank & [88] Trust Company, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city of San Francisco, State of California, on the seventh of February, 1916, and at such further times and places as said Court may from time to time designate.

NOW, if the said Western Underwriting & Mortgage Company shall prosecute this appeal to effect and answer and pay all costs which have accrued and may accrue in the prosecution of this appeal, if it fail to make its plea good, then the above obligation to be void; otherwise, to remain in full force and virtue; and the said bond and obligation is upon the further express condition and agreement by the surety thereof that, in case of a breach of the conditions set forth herein, this Court may, upon notice to such surety, of not less than ten days, proceed

summarily in said action or suit in which this bond is given to ascertain the amount which said surety is bound to pay on account of said breach of said bond and undertaking and render judgment against the said surety and award execution thereon.

Dated this 30th day of October, 1915.

WESTERN UNDERWRITING & MORT-
GAGE COMPANY,

By GEO. G. SMITH,
Vice-president.

[Seal] Attest: F. W. ELLIOTT,
Secretary.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY,

[Seal] By C. W. OESTING,
Attorney in Fact,
Surety.

Approved as to form and sufficiency of the surety
this —— day of October, 1915.

Judge of the District Court of the United States,
for the District of Arizona. [89]

State of California,
County of San Diego,—ss.

On this thirtieth day of October, in the year of
our Lord one thousand nine hundred and fifteen,
before me, H. M. Ball, a notary public in and for
said county and State, residing therein, duly commis-
sioned and sworn, personally appeared C. W. Oest-
ing, known to me to be the person whose name is
subscribed to the within instrument, as the attorney
in fact of the United States Fidelity & Guaranty

Company and acknowledged to me that he subscribed the name of the United States Fidelity & Guaranty Company thereto as surety, and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the county and State aforesaid, the day and year in this certificate first above written.

[Seal]

H. M. BALL,

Notary Public, in and for the Said County of San Diego, State of California.

Approved as to form and sufficiency of the surety this 1st day of November, 1915.

GEORGE W. LEWIS,

Clerk of the District Court of the United States, for the District of Arizona.

By R. E. L. Webb,

Deputy.

[Endorsements]: No. E-20 (Phx.). In the District Court of the United States for the District of Arizona. Western Underwriting & Mortgage Company, a Corporation, Appellant, vs. The Valley Bank of Phoenix, a Corporation, and The Union Bank & Trust Company, a Corporation, Appellees. Bond. Filed Nov. 1, 1915, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [90]

**[Certificate of Clerk U. S. District Court of
Transcript of Record.]**

*In the United States District Court for the District
of Arizona.*

No. E-20 (PHOENIX).

WESTERN UNDERWRITING & MORTGAGE
COMPANY (a Corporation),

Plaintiff,

vs.

THE VALLEY BANK OF PHOENIX (a Corpora-
tion), and THE UNION BANK & TRUST
COMPANY (a Corporation),

Defendants.

United States of America,
District of Arizona,—ss.

I, George W. Lewis, clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing ninety (90) typewritten pages, numbered from one (1) to ninety (90), inclusive, constitute a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause, as *as* is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on appeal from the judgment of said United States District Court for the District of Arizona, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf [91] of the plaintiff for the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S., as amended by Sec. 6, Act of March 2, 1905), for mak- ing typewritten transcript of record, 258 folios at 20¢ per folio.....	\$51.60
Certificate of Clerk to typewritten transcript of record, 3 folios at 30¢ per folio.....	.90
Seal to said certificate.....	.40
	<hr/>
	\$52.90

I hereby certify that the above cost for preparing and certifying the record, amounting to \$52.90, has been paid to me by George J. Stoneman, Esquire, attorney for the plaintiff.

I further certify that I hereto attach and herewith transmit the original assignment of errors and citation issued in the cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the Seal of said District Court at Phoenix, in said District, this 2d day of November, A. D. 1915.

[Seal]

GEORGE W. LEWIS,
Clerk.

R. E. L. Webb,
Deputy. [92]

*In the District Court of the United States for the
District of Arizona.*

WESTERN UNDERWRITING & MORTGAGE
COMPANY (a Corporation),

Appellant,

vs.

THE VALLEY BANK OF PHOENIX (a Corpora-
tion), and THE UNION BANK & TRUST
COMPANY (a Corporation),

Appellees.

Citation.

United States of America to The Valley Bank of
Phoenix, a Corporation, and The Union Bank &
Trust Company, a Corporation, the Defendants,
Greeting:

You are hereby notified that, in a certain case of
equity in the United States District Court in and
for the District of Arizona, wherein Western Under-
writing & Mortgage Company, a corporation, is
plaintiff, and The Valley Bank of Phoenix, a cor-
poration, and The Union Bank & Trust Company, a
corporation, are defendants, an appeal has been al-
lowed the plaintiff therein to the United States Cir-
cuit Court of Appeals, Ninth Circuit. You are hereby
cited and admonished to be and appear in said court,
at the city of San Francisco, State of California,
thirty days after the date of this citation, to show
cause, if any there be, why the order and decree ap-
pealed from should not be corrected and speedy jus-
tice done the parties in that behalf.

WITNESS, the Honorable WM. H. SAWTELLE,
Judge of the United States District Court in and
for the District of Arizona, this 4th day of October,
1915.

WM. H. SAWTELLE,
Judge of the United States District Court for the
District of Arizona.

Service of above citation admitted October 12th,
1915.

STRUCKMEYER & JENCKES,
Attorneys for Union Bank & Trust Co.

State of Arizona,
County of Maricopa,—ss.

George J. Stoneman, being first duly sworn, says
that on the 12th day of October, 1915, he delivered
a copy of the within citation to E. J. Bennitt, presi-
dent of The Valley Bank of Phoenix, at Phoenix,
Arizona.

GEORGE J. STONEMAN,

Subscribed and sworn to before me this 12th day
of October, 1915.

[Seal] JOSEPH S. JENCKES,
Notary Public in and for the County of Maricopa,
State of Arizona.

My commission expires Feby. 16, 1916. [93]

[Endorsed]: No. E-20. In the District Court of
the United States for the District of Arizona.
Western Underwriting & Mortgage Company, a
Corporation, Appellant, vs. The Valley Bank of
Phoenix, a Corporation, and The Union Bank &
Trust Company, a Corporation, Appellees. Citation

Filed Oct. 12, 1915, at — M. George W. Lewis,
Clerk. By R. E. L. Webb, Deputy. [94]

*In the United States District Court for the District
of Arizona.*

WESTERN UNDERWRITING & MORTGAGE
COMPANY, a Corporation Organized and
Existing Under the Laws of the State of
California,

Complainant,

vs.

THE VALLEY BANK OF PHOENIX, a Corpora-
tion, and THE UNION BANK & TRUST
COMPANY, a Corporation, Both Organ-
ized, Existing and Doing Business Under
the Laws of the State of Arizona,

Defendants.

Assignment of Errors.

AND NOW, on this 18th day of September, 1915,
during the regular April, 1915, term of the above-
entitled court, sitting at Phoenix in the District of
Arizona, comes complainant above named, by its
solicitors, George J. Stoneman, Reese M. Ling, E. J.
Henning, C. A. A. McGee, A. J. Morganstern and E.
E. Hendee, and says, that the decree entered in the
above-entitled cause on the 14th day of April, 1915,
is erroneous and unjust to complainant,

I.

Because the Court erred in denying complainant's
motion to strike from the amended answer filed by
Valley Bank of Phoenix, one of defendants above

named, to the amended bill of complaint, all that portion of said amended answer as follows, to wit:
[95*—1†]

(1) All that portion of said amended answer commencing with the words “that simultaneously” in folio 22 (erroneously referred to in said motion as folio 18), page 2, to and including folio 31 on said page, and folios 1 to 32 on page 3; 1 to 32 on page 4 and 1 to and including the words “January 27th, 1912” in folio 18 (erroneously referred to in said motion as folio 12) of page 5; said portion being in words and figures as follows, to wit:

“that simultaneously with the execution of said contract, and as part of the same transaction, this defendant and the said Union Bank & Trust Company entered into a verbal contract and agreement, wherein and whereby it was agreed and understood, that the said Union Bank & Trust Company should have the right, upon payment to this defendant of all moneys expended by this defendant, under the terms of the aforesaid written contract (except such moneys as may have been repaid to it) to have all of the assets which were transferred to this defendant under the terms of the aforesaid written contract of January 27, 1912, (except such as may have been reduced to cash) returned to said Union Bank & Trust Company. And it was agreed that said written contract

*Page-number appearing at foot of page of original certified Record.

†Original page-number of Assignment of Errors as same appears in Original Certified Transcript of Record.

should not embody such verbal agreement aforesaid.

“And this defendant further alleges and shows that while the said contract mentioned in said complaint herein and attached thereto as exhibit ‘A’ provides that the said assets therein referred to shall be and are transferred to this defendant, absolutely, such transfer was made in that form in order to enable this defendant to more readily handle and collect such assets, in its own name.

“This defendant further shows and expressly alleges that the said Union Bank & Trust Company, and this defendant understood and agreed at the time such transfer of said assets was made to this defendant, that such transfer of said assets was simply in the nature of a pledge for the repayment to this defendant of the moneys which this defendant should advance and pay out under the terms of the aforesaid written contract, with the added privilege, however, of this defendant using and handling such assets in such manner as would reduce the same to cash as speedily as possible and advisable, and to apply the proceeds thereof towards the payment to this defendant of the moneys advanced and paid out by it under the terms of said written contract aforesaid.

“This defendant further shows and alleges, that in pursuance of the agreement and understanding hereinabove referred to, both this defendant and the said Union Bank & Trust Com-

pany, ever since the making of said contract of January 27th, 1912, and up and until [96—2] the making of the contract of December 30th, 1913, hereinafter referred to, treated and considered said assets so turned over to this defendant under the said contract of January 27th, 1912, as a pledge, and did also treat and consider the moneys so expended and paid out by this defendant under the terms of the said contract, as an indebtedness on the part of said Union Bank and Trust Company to this defendant, and did so carry said assets and said indebtedness on their respective account books, and said Union Bank & Trust Company did from time to time in its reports to the State Auditor of the State of Arizona, report said assets as being held by this defendant for it, but subject to this defendants claim thereto as security, and did report to said state auditor, as an indebtedness on its part to this defendant, the amount claimed by this defendant for moneys paid by it under said contract of January 27th, 1912, and not theretofore repaid to it.

“This defendant further alleges that said Contract of January 27th, 1912, did not contain and it was not intended it should contain, any release or discharge on the part of this defendant to the said Union Bank & Trust Company, for any deficiency which may remain after the application of the proceeds derived from the assets so turned over to it by said Union Bank & Trust Company under the aforesaid contract.

That each and all of the persons and individuals who signed and subscribed said contract, either as officers of said Union Bank & Trust Company, or as sureties and guarantors, were at the time of such signing said contract, directors of said Union Bank & Trust Company.

“That pursuant to the requirements and terms of said contract, this defendant did pay off and discharge each and all of the debts and liabilities of said Union Bank & Trust Company, as in said contract provided and referred to.

“This defendant further alleges and shows to this Court, that the persons mentioned and described in said complaint and contract, as the sureties for said Union Bank & Trust Company, were not given by the terms of said contract, nor was it intended or contemplated that they should have any interest in the assets so delivered and pledged with this defendant by said Union Bank & Trust Company under the terms of said contract, other than that which they as such sureties and guarantors would have under the law, to subrogation to the rights of this defendant in and to the assets so turned over and delivered to this defendant under the aforesaid contract, remaining uncollected and unreduced to cash on the 27th day of January.”

[97—3]

All of folios 7 (erroneously referred to in said motion as folio 21) to 31 inclusive on page 7; folios 1 to 31 inclusive on page 8 and folios 1 to and in-

cluding the words "and none other" folio 13 (erroneously referred to in said motion as folio 27) on page 9; said portion is in words and figures as follows, to wit:

"And this defendant further alleges, that in the month of May, 1913, and after this defendant had expended a large amount of money and time in connection with its efforts to reduce to cash the said assets so turned over and delivered to it by said Union Bank & Trust Company under the aforesaid contract of January 27th, 1912, and after this defendant had from time to time rendered to said Union Bank & Trust Company, at its requests, statements and accounts relative to the amount of moneys expended by this defendant in behalf of said Union Bank & Trust Company, under the terms of the aforesaid contract, and also of the amounts collected by this defendant on said assets aforesaid, there was had an adjustment and statement of such account existing between the said Union Bank & Trust Company and this defendant in connection with the aforesaid contract of January 27th, 1912, at which adjustment and settlement, it was found by both of the defendants hereto and the sureties and guarantors on said contract, that there still remained unpaid and owing to this defendant from the said Union Bank & Trust Company on account of such expenditures on its behalf by this defendant, after deducting all moneys collected theretofore by this defendant, the sum of

\$164,432.46; and thereafter the said Union Bank & Trust Company carried this amount on its books, as the amount of the indebtedness to this defendant at the date of such adjustment and settlement, in the place and stead of the larger amount shown by its books theretofore; and at the time of such adjustment or shortly thereafter, the note of the said Union Bank & Trust Company in the sum of \$164,432.46 payable and due on the 27th day of January, 1915, was given and delivered to this defendant by the said Union Bank & Trust Company, for the purpose and under the circumstances hereinafter more particularly stated and set forth.

“This defendant further states and alleges, that at the time said note was so given to and received by this defendant, said note was not and was never intended to, in any way or manner place this defendant in any better position than it was and had been prior to the execution and delivery of said note; and said note was not of any value to this defendant and was not intended to be of any value to this defendant, other than as evidence of the adjustment and settlement of all disputes to that date relative to the exact [98—4] amount then due to this defendant from the said Union Bank & Trust Company under said contract of January 27th, 1912.

“This defendant further alleges and shows, that the aforesaid note was executed and delivered by the said Union Bank & Trust Company,

primarily for the purpose of complying with the demand and request of the Bank Comptroller of the State of Arizona, who objected to the manner and method in which the indebtedness owing to this defendant from the said Union Bank & Trust Company, under said contract, was carried on the books of said Union Bank & Trust Company, and who stated that it was the duty of the Union Bank & Trust Company to indicate on its books that such indebtedness to this defendant, under said contract of January 27th, 1912, was an *absolute* on its part to this defendant, and should be determined and fixed and placed in the form of a written obligation, preferably in the form of a note definitely fixing the amount of the obligation to this defendant; that pursuant to such request, said adjustment and settlement of account was had between the defendants hereto, whereby all of the parties to said contract of January 27th, 1912, determined and fixed and agreed upon said sum of \$164,432.46 as the amount of the indebtedness existing on the part of the Union Bank & Trust Company to this defendant, and the aforesaid note was then executed and delivered to this defendant as aforesaid, as evidence of the agreed amount of such indebtedness, and was so received by this defendant for such purpose and none other;"

(3) The words "other than as evidence of the amount so found and determined to be due as aforesaid" in folios 21 and 22, page 9 (erroneously re-

ferred to in said motion as folios 4 and 5, page 10).

(4) All of the words commencing with the words "that said contract" folio 6 (erroneously referred to in said motion as folio 21) and ending with the word "true" folio 16 (erroneously referred to in said motion as folio 29), page 10; said portion is in words and figures as follows, to wit:

"that said contract was entered into because of and in view of the then existing indebtedness on the part of the said Union Bank & Trust Company to this defendant, and for the reasons specifically set forth and referred to in said contract, to which contract of December 30th, 1913, this defendant hereby refers and hereby makes the same a part of this its answer [99—5] that said contract was not entered into for any reasons other than those specifically set forth in said contract, the existence of which reasons and the facts therein stated, this defendant specifically alleges to be true."

This motion being based upon the following grounds, to wit:

That the allegations in said portion of said amended answer so contained and above designated are not sufficient in law to constitute a defense to this action in this, to wit:

That it is attempted by said defendant to plead a parol contract and to rely upon the terms of a parol contract for the purpose of altering the terms of the written contract, admitted by said defendant to exist;

That the alleged facts attempted to be pleaded

are without sufficient or any allegation of any new or other consideration than the consideration set forth in the written contract of January 27th, 1912, admitted by defendant to have been executed and if permitted to be pleaded and relied upon as a defense by defendant will make entirely ineffective the terms of an admitted written contract and in so far 27th, 1912, in that it is admitted by said defendant to rest its defense in this action upon the existence and terms of an admitted written contract and in so far as complainant is concerned also upon the terms of a secret and undisclosed parol contract, alleged to have been entered into without sufficient or any consideration, for the purpose of changing, altering or modifying the terms of the admitted written contract, for all of which reasons and for other and further grounds of this motion, complainant respectfully submits that no evidence under the terms of said alleged parol contract [100—6] pleaded in said defendant's amended answer may be admitted.

II.

That the Court erred in granting the Motion of defendant, The Valley Bank of Phoenix, to dismiss the action and the bill of complaint of complainant, upon the grounds assigned in said motion, that complainant Western Underwriting & Mortgage Company had failed to show cause or to show that the officers of the Union Bank & Trust Company did not have the right to transfer the property described in the bill of complaint to the Valley Bank of Phoenix on December 31st, 1913, in this, to wit: That by the ruling of this Honorable Court so made dismissing

said bill of complaint, this Court necessarily predicated said ruling upon the assumed existence of a parol contract, alleged by defendant by way of affirmative defense, to have been executed contemporaneously with the written contract of January 27th, 1912, set forth in complainant's bill of complaint, and assumed as true the existence of this parol contract, without proof thereof by defendant that said contract of January 27th was not plain and unambiguous as to its terms, and without proof by said defendant of any new or other consideration for the making of said parol contract so by said defendant pleaded as a defense, and upon which said defendant relied.

III.

That this Honorable Court further erred in the granting of the motion of The Valley Bank of Phoenix, one of the defendants above named, to dismiss complainant's bill of complaint, for the further reason, that without proof by said defendant of the existence of a parol contract based upon a new consideration, changing and modifying the contract of January 27th, 1912, as set forth in complainant's bill of [101—7] complaint, said defendant could not rely upon the contract of December 30th, 1913, as set forth in complainant's bill of complaint, and such ruling necessarily construed the contract of January 27th, 1912, to be a contract of pledge instead of a contract of sale.

IV.

That the Court erred in making and entering its decree in favor of the defendants and against the

complainant. Said decree being in words and figures as follows, to wit:

“(Title of Court and Cause.)

The above-entitled cause coming on duly to be tried before the above Court, the Hon. William H. Sawtelle, presiding without a jury, on the 14th day of April, 1915, the complainant appearing by George J. Stoneman, Esq., Attorney and Solicitor, and E. J. Henning, Esq., Attorney and Solicitor; and the defendant The Valley Bank of Phoenix, appearing by C. F. Ainsworth, Esq., its Attorney and Solicitor; and the defendant The Union Bank & Trust Company appearing by Struckmeyer & Jenckes, Esqs., its Attorneys and Solicitors;

“And the said plaintiff having duly submitted to this Court its evidence and testimony in support of the allegations of its complaint herein, and having duly rested its case,

“And the defendant The Valley Bank of Phoenix having by its attorney and solicitor duly moved this Court for the dismissal of the said action, for the reason that the said plaintiff herein had failed to establish the allegations of said complaint herein, and that the evidence and testimony submitted by said plaintiff was not sufficient to sustain the allegations of its complaint nor to entitle it to any relief as against said defendant The Valley Bank of Phoenix.

“And it appearing to the satisfaction of this Court that the evidence and testimony submitted by the plaintiff was not sufficient to support the

allegations of its complaint nor to entitle it to any relief as against the defendant The Valley Bank of Phoenix, and that the motion to dismiss made by said defendant The Valley Bank of Phoenix, should be granted,

“NOW, THEREFORE, IT IS BY THE COURT CONSIDERED ORDERED AND ADJUDGED, that the complaint herein, be and the same is hereby dismissed, and that the plaintiff take nothing by its action; [102—8]

“IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant The Valey Bank of Phoenix, have and recover of and from the plaintiff The Western Underwriting & Mortgage Company, its costs and disbursements herein, hereby taxed and allowed in the sum of \$81.00, and that said defendant have execution therefor.

“Dated this 14th day of April, 1915.

(Signed) WM. H. SAWTELLE,
Judge of the District Court of the United States,
in and for the District of Arizona.”

To all of which rulings of the Court so made, complainant in open court and at the time of said rulings, duly entered exceptions; which exceptions were by the Court allowed.

[Evidence, Testimony.]

The evidence and testimony submitted by complainant, and upon which the ruling of the Court as above set forth was predicated in the above-entitled cause, which came on regularly to be heard in the above-entitled court before the Honorable William

H. Sawtelle, Judge thereof, in the city of Phoenix, Arizona, on the 14th day of April, A. D. 1915, complainant being represented by its attorneys and solicitors, George J. Stoneman and E. J. Henning, and defendant, The Valley Bank of Phoenix, being represented by C. F. Ainsworth, its attorney and solicitors, and the Union Bank & Trust Company by its attorneys and solicitors, Messrs. F. C. Struckmeyer and Joseph S. Jenckes, was as follows, to wit:

[Testimony of Sidney H. Stewart, for Complainant.]

SIDNEY H. STEWART, being called as a witness on behalf of complainant, testified as follows:

Direct Examination.

(By Mr. STONEMAN.)

The WITNESS.—I have not the original of a receipt dated December 31st, 1913, in the following words: “Received of Union Bank & Trust Company the following items transferred [103—9] to us under and by virtue of that certain contract and agreement bearing date the 30th of December, 1913, followed by a list of assets received, signed by Valley Bank of Phoenix by S. H. Stewart, Assistant Cashier. The original is in possession of the officers of the Union Bank & Trust Company.

I have read exhibit 10 attached to the original complaint. The Valley Bank at this time has some of those assets listed in exhibit 10. It has in its possession Road District Improvement Bonds of San Diego, aggregating \$7,123.50. Richard Allen note \$261.00. J. R. Hughes note \$75.50. J. R. Hughes \$25.00. J. R. Hughes \$37.00. H. F. Jordan \$15.00.

(Testimony of Sydney H. Stewart.)

F. H. Thompson \$50.00. F. H. Thompson \$100.00.
J. F. Cleveland \$4,184.76. J. F. Cleveland \$32.60.
Mary B. Lewis \$2,000.00. Mary B. Lewis \$10,000.
There is a balance of Anna J. Lewis, the amount of which I do not know, because we have collected some partial payments. We have the cash or its equivalent. J. M. Phelps showing balance of \$337.53.
Richard W. Bishop \$235.00. C. M. Pope \$1,138.28.
W. S. Furman \$150.00, less partial payments. Fred Young \$200.00. That note has been paid and I have the cash. Alexander Moore \$36.00. Lucinda Lewis \$97.16. This is a balance less partial payments, which payments we have on hand at the present time. I have the abstracts of title mentioned in said exhibit. I have not the contracts of Tex and William L. Love. I have the Barkley and Eva S. Eddy contract. The Love contract has been converted into cash, which we have, or its equivalent. The proceeds of the Love contract amount to \$339.60. We have collected the Seaborn Stone note for \$6,500.00. We have the cash or its equivalent. All of these are held under stipulation and they are in this suit subject to the outcome of this suit.

Of the assets referred to in exhibit 4, consisting of [104—10] real estate, the first three pieces named in exhibit 4 constitute property turned over in the contract of December 31st. The other pieces that were turned over December 31st should have been turned over on January 27th, and in that event we have nothing to do with it.

By the COURT.—(To Mr. STONEMAN.) As I

(Testimony of Sydney H. Stewart.)

understand your statement, you only claim the first three pieces described in exhibit 4.

Mr. STONEMAN.—Yes, sir. We do not claim any property except the first three pieces in exhibit 4 and all the property in exhibit 10.

By the COURT.—Nine and ten as I understand it.

Mr. STONEMAN.—Yes, sir; nine and ten covers it, and the first three pieces in exhibit 4.

By Mr. STEWART.—The face value of assets as it is under date of December 31st, 1913, aggregated \$23,098.55, to which must be added the amount collected from the Seaborn Stone agreement. On January 1, 1915, \$8,893.97 of these assets have been converted into cash. There is no way of telling whether the remaining assets are worth face value.

By the COURT.—(Addressing Mr. STONEMAN.) You are claiming the securities themselves, as I understand it.

Mr. STONEMAN.—Yes, or their equivalent in cash.

By the COURT.—Do I understand, Mr. Stewart, that you have \$23,098.55 in cash or securities plus two items of moneys received on Seaborn Stone agreement amounting to \$3,288 and \$3,437.62?

A. Yes, sir.

By Mr. AINSWORTH.—That you have \$23,098.55 in notes and paper and \$8,893.97 in money?

A. No, sir. We have \$23,098.55 plus the proceeds from [105—11] the Seaborn Stone in exhibit 9. We have either the entire amount in cash or else the original securities. \$8,893.97 represents partial pay-

(Testimony of Sydney H. Stewart.)

ments on the \$23,000.00 securities. The two items, \$3,280 and \$3,247.62 is plus the \$23,098.00, and the balance which come out of the \$23,098.00. There are no other items that were turned over under the first agreement. The furniture and fixtures are presumed to have been turned over to us under the contract of January 27th, 1912. At the time they were turned over, they did not give us a bill of sale, but they asked us to leave them there and let them use it, which we did. This agreement was not made with me personally. I was talking with Mr. Bennett, Mr. Cleveland, Mr. Orme and different ones.

By Mr. STONEMAN.—I renew my motion to strike the answer, for the reason it is hearsay.

By the COURT.—The statement that he got his information from Mr. Cleveland and Mr. Orme will not be stricken. The statement that he obtained the information from the defendant corporation will be stricken.

Mr. AINSWORTH.—Was Mr. Orme vice-president at that time?

A. I think so. I think Mr. Cleveland was cashier. I do not know if Shedd ever was cashier. Cleveland might possibly have been the president. That could be ascertained from the records of the Union Bank books here. I believe Mr. Cleveland was president and Mr. Luther B. Smith was cashier.

By Mr. STONEMAN.—Do you mean that this furniture was turned over under the contract of January 27th or December 31st?

A. January 27th, 1912. All the other assets were

(Testimony of Sydney H. Stewart.)

presumed to be turned over, but this was not. It was always [106—12] my understanding, that the furniture was sold by the Union Bank to the Valley Bank under contract of January 27th.

Q. And that the furniture and these four pieces of property to which you have testified, referred to in exhibit 4, and all other property taken over by the Valley Bank under the contract of January 27th, 1912, from that time on were the property of the Valley Bank? Is that true?

A. I think I have already answered that, Mr. Stoneman.

Q. Well, is it true; is that your understanding of it?

A. Why, the property in exhibit 4, except the first three items, I claim always did belong to the Valley Bank, although the property did not go to the Valley Bank until December 31st, 1913. The title was acquired by the Union Bank & Trust Company on account of settlements they made.—

Q. Of their own property?

A. Of the notes which they had already pledged to the Valley Bank.

Q. And which the Valley Bank had a right to settle in any way it wanted to? A. Yes, sir.

Q. Who was it that made the exchanges and took those properties?

A. Mr. Cleveland obtained from the Valley Bank the Spaulding account, the Spaulding note and Bowers' note, which was exchanged in lieu of Parcel 4. These were the notes turned over to the Valley

(Testimony of Sydney H. Stewart.)

Bank under the first agreement. Mr. Cleveland was acting for the Union Bank & Trust Company. I presume he made the exchanges, because I took his receipt for the notes. Mr. Cleveland made the exchange [107—13] of the Redewell note. Also of No. 6. I cannot say who made the exchange of No. 7. The exchanges were made along in the middle of summer or the first of fall after the notes were taken by the Valley Bank under contract of January 27th, 1912. The contract of January 27th is the contract set out in exhibit "A" of the bill of complaint, and the contract of December 31st is set out in exhibit "I" of the bill of complaint.

Mr. AINSWORTH.—As I understand it, items 4, 5, 6 and 7 of exhibit 4 was property they held in some form in the Valley Bank under contract of January 27th, and that Mr. Cleveland of the Union Bank had taken those securities and made these exchanges for these particular pieces of property, and took the title in the Union Bank & Trust Company, and that afterwards the Union Bank & Trust Company by the last contract turned it over to the Valley Bank. Is that right, Mr. Stewart? A. Yes, sir.

By the COURT.—What I was trying to get at was to ascertain what connection the Union Bank & Trust Company, or its officers, had with these securities that were turned over on January 27th, 1912?

A. They always contended it was to their interest to get these notes liquidated and to cut down their indebtedness as quickly as possible.

By Mr. STONEMAN.—We object to that testi-

(Testimony of Sydney H. Stewart.)

mony, because it is contrary to other testimony put in the record by the witness himself, and it has not been shown that the witness is competent to testify to any parol change of the contract of January 27th.

By the COURT.—I overrule the objection and permit the witness to state the facts. [108—14]

Mr. STONEMAN.—Was that objection interposed in response to your Honor's question?

The COURT.—Yes.

Mr. STONEMAN.—Then I withdraw it.

Mr. AINSWORTH.—Were you assistant cashier at the time these changes were made?

A. I was assistant cashier of the Valley Bank. I made up the list marked as "Schedule" under the supervisions of Mr. Shedd, assistant cashier of Union Bank & Trust Company, from the books of the Union Bank Trust Company. We included in these lists everything shown by the books.

(The list is produced.)

Q. I will ask you to look at this one, entitled "Report of conditions January 27th, 1912." Who made up that first page, calling your attention to "Reserves and Liabilities"?

A. The statement was taken from the books of the Union Bank & Trust Company and was made up by the officers of the Union Bank & Trust Company. It was taken by Mr. Shedd, assistant cashier of the Union Bank & Trust Company and myself, assistant cashier of the Valley Bank.

I read into the record statement called "Report of the Condition of the Union Bank & Trust Company

(Testimony of Sydney H. Stewart.)

at Phoenix, at close of business on January 27th, 1912.” (Reads report.)

All the tangible resources totaling \$485,544.13 was taken over by the Valley Bank. The assets exceeded the liabilities at face by \$54,745.49. The liabilities assumed to be paid by the Valley Bank aggregated \$430,798.64, subject to errors and omissions. The total resources amounted to \$485,544.13, subject to errors and omissions, and in that we included the furniture and fixtures. We proceeded with [109—15] the assistance of the officers of the Union Bank & Trust Company, including Mr. Cleveland, Mr. Shedd and Mr. Orme, to liquidate these resources. Mr. Cleveland and Mr. Shedd took part in this and interviewed different ones on these notes. As an example Mr. Cleveland took the note of E. A. Spaulding and Bowers and made settlement on these notes. Mr. Shedd was there in the Valley Bank and helped out in carrying out the liabilities and in collecting resources. Mr. Cleveland, Mr. Orme, Mr. Swettman and Mr. Luhrs asked me at various times how collections were coming along, and we had meetings and went through these assets at various times. We did not collect all the assets mentioned. We converted \$364,631.67 up to the end of the contract, January 27th, 1915. We paid out on liabilities \$430,783.59. In the \$8,839.97 collected under the second contract, there was not included money received for furniture and fixtures made under sale by order of this Court. Sale has not been completed.

Mr. STONEMAN.—I direct your attention to

(Testimony of Sydney H. Stewart.)

wording of Defendant's Exhibit "I." On the following page appears to be a report of the condition of the Union Bank & Trust Company at the close of business January 27th, 1912. There was included in that no specification of items turned over to the Valley Bank?

A. There was not any detailed list made of furniture and fixtures. Later on, the list appearing on second page of Defendant's Exhibit "I" of assets turned over by the Union Bank to the Valley Bank under contract of January 27th, was made. The Union Bank was to turn over all the other assets as shown by that statement. We made a detailed account of all assets, but no detailed account of furniture and fixtures. [110—16] We did not make a list of furniture and fixtures according to that statement of resources as shown by Defendant's Exhibit "I."

Q. Is not this list the list referred to as exhibit "B" in the written agreement of January 27th, 1912?

A. To the best of my knowledge it is.

Q. And constitutes all the assets at that time purchased by the Valley Bank from the Union Bank with the exception, as you claim, of the bank furniture and fixtures? A. I believe it does.

Q. Now, was it not intended when this transfer was completed in January, 1912, between the Union Bank and the Valley Bank, that the Valley Bank should take over everything which the Union Bank had specified in this list?

A. It was, with the understanding that they could use that.

(Testimony of Sydney H. Stewart.)

Q. Use what? The furniture and fixtures?

A. Yes, sir. That is the reason we did not make a detailed list of them. With the exception of the furniture and fixtures, the contract of January 27th, reading the list which is referred to in that contract as exhibit "A," contains all the property which the Valley Bank took from the Union Bank, so far as I know. That was all turned over, and the understanding was made between the Union Bank and Valley Bank, or by the Union Bank, to use the furniture and fixtures and conduct a trust business. We had no use for them, and did not make an itemized statement of the furniture and fixtures. When this contract was completed, the Union Bank had practically gone out of the commercial business. On January 27th, 1912, the furniture and fixtures belonged to the Union Bank & Trust Company. [111—17]

Q. Subsequent to the execution of the contract of January 27th, who did the furniture belong to?

A. It was supposed to belong to the Valley Bank, and we allowed the Union Bank to use it.

Q. And it was the Valley Bank's own property?

A. Yes, sir.

Q. The Valley Bank could have sold it at any time it wanted to?

A. Yes, sir. And the furniture and fixtures was put up as collateral the same as the notes and securities, and like that. [112—18]

E. J. Henning, Counsel for plaintiff, stated: The books of the Union Bank and Trust Company are in Los Angeles, in custody of the Federal Court there.

(Testimony of Sydney H. Stewart.)

The two hundred fifty-one (251) shares that, according to the former testimony, constituted absolute control of the common stock, then stood and now stand under the name of the Western Underwriting and Mortgage Company. The testimony of Mr. Smith, the secretary, was that the Western Underwriting and Mortgage Company holds that stock as collateral only, and is not the owner of it, and that the true owner of it is J. K. Tennant, and Tennant at all times refused to vote that stock, taking the position that the title is now in plaintiff. We then offer an amendment to our complaint to conform to the testimony of Mr. Smith, which was granted. That was the testimony I referred to at the former trial.

Mr. AINSWORTH.—So far as the stock standing in the Mortgage Company, I have no doubt about it, but since the last trial we have discovered some testimony, and we think of their own admissions claiming themselves to be owners of that stock. We have the testimony here where they claim themselves to be the owners, and if those minutes were here—Some of the testimony that I got from Mr. Klien was in the record here and was in the record of the Union Bank and Trust Company that you say the district attorney has taken away now. I suppose it was up here when I came up this morning until they raised the question about it.

By the COURT.—The question is whether or not you will admit the evidence and admit the statement made by counsel for the plaintiff with reference to

(Testimony of Sydney H. Stewart.)

ownership of the stock.

By Mr. AINSWORTH.—I will admit that it stands on the books of the corporation of the Western Underwriting Mortgage Company 251 shares of the capital stock of the Union Bank and Trust Company. [113—19]

By the COURT.—I will adjourn now until half past one, and give counsel an opportunity to see whether they can enter into a stipulation which will avoid the necessity of having the books produced.

The Court having convened at one-thirty, Mr Henning stated: “It is stipulated that 251 shares of the common stock of the Union Bank and Trust Company stands in the name of plaintiff since June 31st, 1913, and has continued to stand in the name of plaintiff ever since, and that 251 shares constitutes a majority of the common stock of Union Bank and Trust Company; That Mr. Rosa, at the time of commencement of this action owned a majority of the remaining common stock of United Bank and Trust Company.

Mr. AINSWORTH.—And another thing that that stock actually belonged to the Bank at that time or about that time.

By Mr. HENNING.—You mean the Western Underwriting and Mortgage Company?

By Mr. AINSWORTH.—It actually belonged to them in June, 1913.

By Mr. HENNING.—Well, it is further stipulated that either the latter part of June or early in July, 1913, Mr. McGhee, one of the attorneys for

(Testimony of Sydney H. Stewart.)

Western Underwriting and Mortgage Company appeared before a meeting of the stockholders of Union Bank and Trust Company at Phoenix, Arizona, and stated that the Western Underwriting and Mortgage Company was owner of 251 share of common stock of the United Bank and Trust Company.

By the COURT.—Now then, as I understand it, you stipulated that the 251 shares of common stock was in the name of plaintiff and owned by plaintiff, and is still owned by plaintiff.

By Mr. HENNING.—No, that is not the stipulation. The stipulation is that it stood in the name of plaintiff since June 21, 1913, without proving the ownership since commencement [114—20] of this action, but that subsequent to the time of its issue, Mr. McGee appeared at a meeting of the Union Bank and Trust Company and stated that the Western Underwriting and Mortgage Company is the owner of 251 shares of the common stock of Union Bank and Trust Company.

By the COURT.—While you were making this stipulation, both this time and the time before, Mr. Ainsworth made the suggestion that the Underwriting Company was the owner at that time. You do not seem to agree on this.

By Mr. HENNING.—We expect to introduce proof that it became the property of Tennant, also it remained standing in the name of plaintiff and has been held by plaintiff since September, 1913, as collateral to a note. My statement was that a representative of the plaintiff said the plaintiff actually

(Testimony of Sydney H. Stewart.)

owned it on June 21, but we expect to prove that it became the property of Mr. Tennant, although it remained standing in the name of the plaintiff. We have reached an agreement that at the meeting on July 9th, we asserted the ownership of that stock. We intend to prove that subsequent to that time we sold that stock to Mr. Tenant, and before the bringing of this action, and that at the time of the bringing of this action, it was the property of Mr. Tennant.

By Mr. AINSWORTH.—Of course I do not admit the sale. We do not know anything about this. We claim that in June, 1913, this stock actually belonged to the plaintiff. It is admitted that common stock is the only stock having voting power in Union Bank and Trust Company, and there are only 500 shares of it, and these 251 shares are a majority of it.

[Testimony of G. C. Smith, for Complainant.]

G. G. SMITH, called as a witness on behalf of the plaintiff, being first duly sworn testified as follows:

By Mr. STONEMAN.—I hand you a note dated December 22d, 1913, purporting to be signed by J. K. Tennant, and the certificate [115—21] of 251 shares of the common capital stock of Union Bank and Trust Company attached thereto. Have you ever seen that note and stock before? I have. (Note and certificate of stock marked exhibit “A” for identification.)

By Mr. STONEMAN.—I desire to read this note into the record. Objection by Mr. Ainsworth.

By Mr. STONEMAN.—The offer is made as tending to show the ownership of the 251 shares of com-

(Testimony of G. C. Smith.)

mon stock attached to the note as collateral security prior to the bringing of this suit.

By the COURT.—The ownership on the part of Tennant?

By Mr. STONEMAN.—Yes, sir.

By the COURT.—It may be admitted, and objection is overruled.

By Mr. STONEMAN.—This note is as follows:

\$40,000.00 San Diego, Cal., Sept. 22d, 1913.

On or before eight (8) months after date, I promise to pay, for value received, to the Western Underwriting and Mortgage Company, the sum of Forty thousand (\$40,000.00) Dollars, gold coin of the United States of America, at its office at the city of San Diego, California.

I herewith pledge as security for the payment hereof two hundred fifty-one (251) shares of common stock of the Union Bank and Trust Company, a corporation, of Phoenix, Arizona, attached hereto.

Signed by J. K. TENNANT.

By the WITNESS.—I know the signature of J. K. Tennant. That is his signature.

By Mr. STONEMAN.—Will you explain to the Court how this certificate, if you know, of 251 shares was attached by J. K. Tennant as security for the payment of the promissory note which I have just read.

A. You mean regarding just the transaction that attached [116—22] it to this note?

A. Yes, sir.

(Testimony of G. C. Smith.)

(By Mr. AINSWORTH.)

The WITNESS.—Since last August, 1914, I have been secretary and manager of the Underwriting Company. I was not connected with this company in 1913. My knowledge of this transaction is not necessarily based on what the company told me. I attended several meetings and also directors' meetings in 1913. I was not present at the time this note was given. I was at a conference afterwards; the matter was talked over. My knowledge is not derived altogether from something told me afterwards. After the note was executed, I was told what happened. I based my evidence from the records of the corporation.

By Mr. AINSWORTH.—Then we object to it, as the records are the best evidence.

By Mr. STONEMAN.—Q. Did you have any talks with Mr. Tennant himself?

A. Yes, sir, and every member of the board that was present when it was made. I talked just prior to March 5th, 1913, when this suit was filed, and just prior to the time this note was given, and afterwards I talked with Mr. Tennant himself. Tennant merely settled the suit with the Underwriting Company, which the Underwriting Company brought against him for Sixty-five Thousand (\$65,000.00) Dollars. I was present at a couple of conferences before the settlement. I saw the pleading in the suit. I knew the suit was filed and I was in Los Angeles when it was filed.

By Mr. AINSWORTH.—We object to what Mr.

(Testimony of G. C. Smith.)

Tennant said about it after the suit was filed. It is hearsay; it is simply a statement of past transactions and hearsay.

By the COURT.—I will admit it subject to the objection of defendant. I may exclude it later on.

By the WITNESS.—He spoke regarding this stock several [117—23] times. The last distinct time I remember, he told me he had bought the stock back and was going to sell it at a good profit for himself, that our company were fools for letting him have it. Prior to March 5th, 1914, Tennant told me he owned this stock.

By Mr. STONEMAN.—Now relate to the Court the conditions, as nearly as you know them, explaining the apparent discrepancy as shown by the stock transfer books of the Union Bank and Trust Company; why this certificate now appears in the name of Western Underwriting and Mortgage Company, instead of in the name of Tennant, whom you say claims the ownership of this stock.

By the COURT.—Objection sustained because the question as framed calls upon witness to make a statement with reference to some entry in the books, and the books are the best evidence.

By Mr. STONEMAN.—Exception. Do you know why this certificate appears to be standing in the name of the Western Underwriting and Mortgage Company? A. Yes.

By Mr. AINSWORTH.—From what source do you receive your information?

A. A letter from Lloyd B. Christy more than any-

(Testimony of G. C. Smith.)

thing else. I have the letter in my hand. (Admitted by Mr. Ainsworth; the letter is signed by Christy.)

By Mr. STONEMAN.—We ask to read this letter into the record.

By Mr. AINSWORTH.—Objection on the ground that it is irrelevant and hearsay. It is simply some transaction between somebody and the Bank and has no bearing on this question. Mr. Christy is simply stating what somebody else told him.

By the COURT.—The objection is sustained. (Will mark [118—24] exhibit “C” for identification.) I do not know from my own knowledge whether or not Tennant, if he had been requested so to do, would have voted any shares of stock owned by him in favor of the bringing of this action.

Cross-examination by Mr. AINSWORTH.

Isn't it a fact, Mr. Smith, that Mr Tennant has repeatedly stated to you prior to March 5th, 1914, that the Western Underwriting and Mortgage Company owned the stock and that he did not own it.

A. No, sir, he never told me that.

Q. Didn't he tell you that they fell down on the contract, and that they owned the stock and he didn't.

A. No, sir. He never has to this day told me that the company owned it.

Q. Didn't he tell you that he never bought the stock back because they never carried out the contract.

A. No, sir. In January of this year, I went to

(Testimony of G. C. Smith.)

Tennant myself to give him the right to vote this stock over here, and he said he would not vote it, and would not have anything to do with it, and I said we cannot vote it. He said, if you don't, I will hold you for any damages which I sustain.

Q. Hasn't he said in his answer that you were absolute owners of that stock in the suit that you brought. Isn't that the substance of it?

A. No, sir. He not only claims that we have got to take the stock for his notes, but claims that we have to give him Ten Thousand (\$10,000.00) Dollars besides.

By WITNESS.—A short time after September, 1913, Tennant did claim to own this 251 shares of stock, and the only reason he would not take it was that he wouldn't be compelled to take the stock because the Western Underwriting and Mortgage Company didn't carry out their contract. That is the defense he sets up to the Forty Thousand (40,000.00) Dollar suit. After that [119—25] time he told me he was going to sell it and make a nice profit for himself and the company was a fool to let him have it. The Western Underwriting Company has never considered the stock as theirs. The collateral was not sold because we would have to have a judgment before we could sell it.

By the COURT.—When did you file your suit?

A. Mr. Henning could tell you more about that than I can.

By Mr. HENNING.—The answer was made October 14, 1914. I might say to Mr. Ainsworth that

(Testimony of G. C. Smith.)

I have here a correct copy of the answer, and would be very glad to let him have it, and very glad to have it offered in evidence.

By Mr. AINSWORTH.—Did you say you have not exercised any rights of ownership since the note was given?

A. Well, there never has been any acts in the minutes regarding this at all, and none since I have been in the office since August, 1914. This note was given in September, 1913. The minutes would show whether they exercised any rights of ownership prior to the time I went in.

Q. Then you do not know of your own knowledge whether they tried to sell it or anything like that?

A. They could not sell it.

Q. Why not—because it did not stand in their name?

A. Why. I could not sell a horse just because it was in my barn.

Q. Didn't they endorse it?

A. Yes, sir. [120—26]

[Testimony of Joseph S. Jenckes, for Complainant.]

JOSEPH S. JENCKES, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

On and prior to the 5th day of March, 1914, I was vice-president and acting secretary of Union Bank & Trust Company. I know W. L. Rosa. Our firm represented him in a personal matter he had before this Court. Prior to March 5, 1914, I was acting under instructions from Rosa with reference to the

(Testimony of Joseph S. Jenckes.)

interest which Rosa had in Union Bank & Trust Company at that time, i. e., prior to the filing of this suit. We had instructions from him with reference to this action. Not this particular action, but with reference to any action on the part of the bank against the Valley Bank, he being president of Union Bank & Trust Company.

Mr. STONEMAN.—Under those conditions, did you know whether Mr. Rosa would have consented, as a member of the board of directors and as a stockholder, to Union Bank & Trust Company, to the bringing of a suit by Union Bank & Trust Company?

By Mr. AINSWORTH.—We object to that question.

By the COURT.—We admit it subject to defendant's objection.

WITNESS.—The last word I had from Rosa, he was in Los Angeles. A demand was made upon me, as a member of the board of directors of Union Bank & Trust Company, prior to March 5th, 1914, asking the Union Bank & Trust Company to institute this suit for the accomplishment of that which is sought in this suit. I was a member of the board at that time. The board refused to bring this suit. It is my recollection the board of directors acted upon this demand, and it is a matter of record in the minutes. The minutes are in the hands of the court in Los Angeles. [121—27]

Mr. AINSWORTH.—I would rather have the minutes then.

By the COURT.—Then I will sustain this objec-

(Testimony of Joseph S. Jenckes.)

tion, and let it stand until to-morrow morning, and I will let you introduce the records at that time. I will permit you to introduce those, even though you have rested your case.

By Mr. STONEMAN.—I am going to make this suggestion. This testimony merely bears upon the jurisdiction of this Court, to further entertain these proceedings, and it may be proven now or later on. In the meantime, if the books should sustain our contention, that this Court has jurisdiction, we could proceed with the case as far as we can.

By the COURT.—I want you to proceed as far as that evidence is concerned. I will give you an opportunity to introduce the books for that purpose.

By Mr. STONEMAN.—Do you know whether that demand had been made on Rosa personally as a stockholder to vote in favor of a resolution directing the board of directors to institute this suit, whether Rosa as a director would so have voted?

Mr. AINSWORTH.—I object to that, because Rosa controlled a minority of the stock anyhow.

By the COURT.—Well, as I understand it, he controlled a majority of all the stock that was claimed by plaintiffs, or rather claimed by Tennant. The stock they sold to Tennant.

Mr. AINSWORTH.—Well, that has not been proved.

By the COURT.—Of course, this is to be taken together with all the other evidence on that subject. You cannot introduce it all at one time. I admit it subject to defendant's objection.

(Testimony of Joseph S. Jenckes.)

WITNESS.—I do not know, Mr. Stoneman, what Rosa would [122—28] have done if such a demand should have been made upon him, but I do know the matter was discussed with Mr. Rosa,—the question of bringing an action of this kind against the Valley Bank, and the matter was left entirely in our hands, and Mr. Rosa informed us he would be guided by our advice.

Q. Now, at the time and immediately prior to the bringing of this action, would you, in behalf of Rosa, have authorized the action?

Mr. AINSWORTH.—We object to that. The question as to putting it up to your attorney as to whether they would bring a suit or not. They are not the stockholders.

By the COURT.—Well, under this equity rule, the plaintiff is required to show what efforts he has made to induce the stockholders to bring a suit. I do not believe we should be as technical in the admission of evidence on that question as on some other questions. Anything which tends to show good faith on the part of the plaintiff, and what he has done or had done before the institution of the suit, to obtain action by the directors or officers of a corporation or of shareholders, should be admitted. I will hear all this testimony before finally ruling, and I will admit it subject to your objection.

Mr. STONEMAN:—Q. Assuming, Mr. Jenckes, that the record will bear out this statement, that a demand was made by the Western Underwriting & Mortgage Company upon the directors to bring this

(Testimony of Joseph S. Jenckes.)

suit, and the directors refused. As a member of the board of directors, are you able to state whether such refusal on the part of the board of directors was the result of any collusive action or agreement between Western Underwriting & Mortgage Company and the board of directors of Union Bank & Trust Company? [123—29]

A. I am able to say it was not upon any such collusive arrangement. I want to state that this matter of bringing this suit by the Union Bank & Trust Company against the Valley Bank was gone into very carefully by Mr. Struckmeyer and myself and Mr. Rosa and discussed in the directors' meetings. Also Mr. Klein, who was the cashier of the company was present, and we, at that time, came to the conclusion, that it was not the best thing to do to bring this suit at that time. There was absolutely no collusive arrangement with the Western Underwriting & Mortgage Company or the attorneys for the Western Underwriting & Mortgage Company.

By the COURT.—Was that decision arrived at after the demand had been made upon that corporation, that they bring such an action?

A. No, sir. The decision was arrived at before, concerning the bringing of the suit by the bank itself. I think the Western Underwriting Company felt the suit should be brought. A member of Mr. Henning's firm was here, and they thought we should bring a suit, and we told them the reasons why we thought the suit should not be brought, and *subsequent* this demand was brought on us.

(Testimony of Joseph S. Jenckes.)

By the COURT.—Now, as to the action that was taken by the directors, you may await the arrival of the minute books.

By Mr. AINSWORTH.—What was the reason you did not want to bring it?

A. The reason was, that we had something like thirty-one or two suits pending in the Superior Court of Maricopa County by the bank against the various people who had given their notes for stock in the company, and the pleadings [124—30] in those cases, i. e., the allegations on the part of the bank and the allegations on the part of the people who were defending and also suing the bank,—the suits were brought against the bank and by the bank against the parties who gave the notes,—and if we had brought the suit in the State Courts at that time, and set up a lot of facts upon which we would have to bring this suit, we thought it would depreciate our chances of winning the suits in the state courts against the note makers. The proposition was discussed as to whether it could be brought in the Federal Court by anybody else, so that we would have to appear and stultify ourselves as it were. In other words, we thought it might hurt us, if we brought the suit in the state courts. We hoped to bring the suit later against the Valley Bank. It was not an absolute refusal. We thought the time was not yet ripe to bring the suit.

By Mr. STONEMAN.—If your Honor please, we have come to the point in the case where, in the event your Honor feels it to be necessary to submit

(Testimony of Joseph S. Jenckes.)

any further evidence touching the refusal of Tennant as a stockholder as we claim of the Union Bank & Trust Company to bring this suit, or the futility of making a demand on him as a stockholder to bring this suit,—It will be necessary for us to ask your Honor to receive the testimony of Mr. Henning, through whom all this business was transacted, and into whose custody was given the dealings with Tennant. No one, not even the officers of the Western Underwriting & Mortgage Company themselves, could testify except on information from Mr. Henning. The objection would be, if we introduced any officers, that it is heresay from Mr. Henning. We recognize that it is unusual, both Mr. Henning and myself realize that it is a disagreeable thing to request, and we leave [125—31] the matter in your Honor's own judgment, and shall be satisfied with your judgment.

By the COURT.—I do not like to rule at this time that I think the evidence is sufficient, but while I realize the embarrassment that comes to a lawyer when he is called upon to testify, the exigencies of the case seem to require it, and it is entirely proper for him to do so.

Mr. STONEMAN.—We thank your Honor for the consideration and I will call Mr. Henning.

[**Testimony of E. J. Henning, for Complainant.**]

E. J. HENNING, was called as a witness on behalf of plaintiff, and being first duly sworn, testified as follows:

I and my firm have been for some time past coun-

(Testimony of E. J. Henning.)

sel for Western Underwriting & Mortgage Company, a corporation in San Diego. I am acquainted with J. K. Tennant, and also with Judge Trask, of Los Angeles, who is now dead. Judge Trask at the time I knew him at different times was attorney for J. K. Tennant. Based upon statements made to me, Tennant would have refused to vote any stock or vote this stock, had he been requested as a stockholder to bring this action:

By Mr. AINSWORTH.—Objected to as hearsay.

By the COURT.—Objection overruled.

Before the annual meeting of the Union Bank & Trust Company in January, 1914, Judge Trask was at that time counsel for and representing Mr. Tennant in this matter. Just prior to that he appeared for Tennant in the suit we brought against Tennant, which, however, had been settled. Judge Trask represented Tennant in the settlement, which resulted in this forty thousand dollar note to which the stock certificate is attached. Judge Trask called me on the 'phone and stated the Western Underwriting & Mortgage Company had failed to carry out its agreement with him and Mr. Tennant; that this stock certificate for 251 shares of Union Bank & Trust Company was to be transferred on the [126—32] books of the trust company to us. That was the word he used. From the record it appears Mr. Silvers. And he said the annual meeting is tomorrow and we are unable to use that stock. I did not know at the moment just what had been done and asked for a little time to look in the record.

(Testimony of E. J. Henning.)

Mr. McGee, my partner, and I went into *the and* the books, and we found that the transfer had not been made. A demand had been made for a certified copy of the resolution, and we found there was no such resolution. Mr. McGee and I both talked with Judge Trask over the 'phone, tendered them the proxy or agreed to wire to someone in Phoenix and have them attend the meeting and vote as they desired he should vote on the election of directors or other important matters, or send someone to the meeting to ask for an adjournment until the transfer could be made. Judge Trask said you have violated your agreement and we decline to have anything further to do with the transfer of your stock. As the outcome of that situation, a suit is pending in Los Angeles County, in which Western Underwriting & Mortgage Company is plaintiff against Tennant on this forty thousand dollar note. In that suit, Tennant answered through Mr. Brown, the partner of Judge Trask when this all occurred, and in his answer he sets up that we violated our agreement, and because of the fact that he couldn't control the meeting at Phoenix, the stock had become of little value, and asks that the note be cancelled and we be required to accept that stock in settlement of the note, and pay him the difference between the \$40,000.00 note and the value of the stock when it was given to him, that is \$50,000.00, and asks for judgment in the cross-complaint in the sum of \$10,000.00. Mr. Tennant, at the time Judge Trask talked to me over the phone repeatedly told

(Testimony of E. J. Henning.)

me that "You have violated your agreement, [127—33] and you will have to keep this stock," insisting that he could not keep this stock, and that it was not in his name. I would not like to fix dates, because Mr. Tennant said it so often. I know that when this suit was brought here, that we advised you that it wasn't any use advising Tennant about it.

(By Mr. AINSWORTH.)

WITNESS.—Tennant did not specifically say we owned the stock, but he said, "You can keep it." About the 21st of June he did say something equivalent to saying we owned it then. At that precise time, we were not attorneys for the corporation except in the suit brought against the corporation. I might say, we found the stock in the records, in the files of the corporation, and assumed that it did belong to the corporation, and exercised rights of ownership over it. It was never transferred back to Tennant in any form. Tennant said the stock was not his, but he never says it was the property of Western Underwriting & Mortgage Company. It stands on the books of the Western Underwriting & Mortgage Company and has not been transferred to him since June, 1913.

By the COURT.—If it be admitted that the records of the corporation will, when introduced, show that the managing directors for the corporation, for any reason, declined or refused to bring this suit upon request, then I think the showing made by plaintiff, showing its efforts to secure the action

(Testimony of E. J. Henning.)

which it desired on the part of the managing directors of the corporation and the stockholders is sufficient, and hold that the court has jurisdiction to hear and determine this matter. But of course, I do not announce that ruling to go into the record to hold that unless the [128—34] records be introduced to show the facts as referred to by Mr. Jenckes, I sustain your objection to the statement of the witness, because the record would be the best evidence of that, but if it be admitted that the records will show that, then I shall hold that this Court has jurisdiction. Whether Tennant did or did not hold the shares of stock, evidently there was a dispute as to the ownership, and this man Rosa had left the matter entirely to his counsel and that they thought it was not best for any reason to bring the suit at that particular time, then I think the plaintiffs in this case, are authorized to bring the suit. In other words, I do not think that it is incumbent upon the plaintiffs to wait indefinitely to determine, or for the directors to determine just when and at what time they would bring this action against the defendant. You may now proceed with the other branch of the case.

By Mr. STONEMAN.—I think, your Honor, that we will submit our case. Mr. Henning and I believe we have introduced proof of everything which was not submitted by the answer with the exception of tying up by the record of the minutes, which will be here tomorrow, and we therefore rest.

Mr. AINSWORTH.—Well, we cannot go ahead

(Testimony of E. J. Henning.)

now because if the record shows what we think it does, we do not think they have any action at all.

By the COURT.—I understand that a demand was made on Klein to bring a suit at that time, as testified to by the witness Jenckes. I say if they did take any action, the minutes would be the best evidence. If the demand was made and not complied with, then this testimony would be received to the effect that such a demand was made, and that they didn't take any action. [129—35]

By Mr. AINSWORTH.—Then we shall move to dismiss this action on the ground that they have not shown any fraud, in that these officers did not have the right to transfer this property to this bank at this time. There is no evidence in this case but what they had the perfect right. They allege we (they) transferred it and we say we (they) did. We maintain that the bank had the perfect right to make this transfer for the indebtedness that they admit.

By the COURT.—I do not know how much of the allegations you have admitted in your answer. I am not prepared to rule on that question without some further light on the subject.

By Mr. AINSWORTH.—This brings us down to the pleadings practically if the Court pleases, and they rest their case on simply putting in the fact that we obtained these certain securities under the second contract. Now, I submit that this Court cannot render a judgment for this plaintiff on these pleadings for any amount whatever at the present

(Testimony of E. J. Henning.)

time, conceding the fact to be that the first contract was entered into as stated, and that the second contract was entered into, and that it was a qualified admission, we say that this was turned over, the first as security, and that the second was on account of paying a debt that they then owed. Now, they haven't proved anything to the contrary. Now, to get down to the facts; of course this is a pretty long complaint, and I realize that the Court would not understand offhand what our admissions cover because our admissions cover a great amount of ground. This morning the only evidence that was introduced was the things that went into the first contract and what went into the second contract. I do not see how the Court can render a judgment if we stop right here. Now, in order to get at this, it will be necessary for the Court to read the complaint if the Court [130—36] is not familiar with it.

(Thereupon the pleadings were discussed at length by Mr. Ainsworth.)

By the COURT.—I should like to hear from plaintiff's counsel.

(Argument by plaintiff's counsel.)

By the COURT.—(To Mr. AINSWORTH.) In other words, I understand your motion to be, that the pleadings in this case disclose that there were two valid contracts executed.

(By Mr. AINSWORTH.—Yes, sir.

By the COURT.—And that the plaintiffs have not shown the invalidity of either of these contracts, and that therefore the plaintiff is not entitled to recover.

By the COURT.—(To Mr. STONEMAN.) Is the Court to assume that there was no consideration for the second contract?

By Mr. STONEMAN.—There could not be from the pleadings themselves. There is the unlawful assumption that there existed an indebtedness from the Union Bank to the Valley Bank under the contract of January 27th. May it please your Honor, I direct your especial attention to the fact that the contract of December is predicated on the contract of January 27th. It is mentioned all the way through, and it could not be because of the necessity of pleading a parol destruction of the written contract of January 27th.

By the COURT.—That, it seems to me, is the point. If the bank itself really recognized the first contract, and for that reason or by reason of any subsequent or contemporaneous parol contract, enters into a valid second contract, is there anything in the pleadings upon which the Court can now hold that contract was void?

By Mr. STONEMAN.—If your Honor please, The Union Bank & Trust Company attempted under the contract of December to [131—37] say that it owed the Valley Bank a certain specified sum of money under the terms of a contract of January 27th.

By Mr. STONEMAN.—As against a minority stockholder whose interest was affected, we say “no.” We say that on the face of the transaction itself, neither the Union Bank nor the Valley Bank

had the right to execute the contract of December, and they never would have that right unless an indebtedness existed. And if an indebtedness did exist, it was only under the terms of the parol contract.

By the COURT.—Now, will this Court say, taking the original contract of January 27th, 1912, and the contract of December 30th, 1913, and the pleadings in this case, may this Court as a matter of law determine that there was no consideration for the second contract, that the officers of that corporation had no authority to execute it? That it was a fraud, a legal or an actual fraud, upon minority stockholders? May this Court conclude from those contracts and from the pleadings that no such authority existed on the part of the Union Bank & Trust Company to execute that subsequent written contract, embodying what was, so far as the contract itself goes, their understanding of what the original contract was intended to be, and their understanding of any subsequent or contemporaneous parol contract.

By Mr. STONEMAN.—My answer to that is this, that if, from an examination of these pleadings, it appears that the authority and the legal existence of the contract of December 30th must be made to depend upon the contract of January 27th, and construing these two contracts together, if the contract of January 27th shows that it was fully executed, and that there existed no indebtedness for which the Union Bank could be charged, as is attempted to do in the contract of December 30th, then you

must look somewhere else to discover [132—38] whether or not the board of directors of the Union Bank & Trust Company had the authority to execute the contract of December 31st, because the consideration was that the Union Bank was indebted to the Valley Bank at that time. And the only place you can look to discover that fact is the parol contract pled in the answer and upon the validity of which rests the entire defense of this action, because the written contract absolutely precludes the possibility of their existing an indebtedness subsequent to the turn-over.

By the COURT.—I will grant you that that would be the legal presumption, that the Court would be called upon to reach that conclusion, but isn't the burden of proof upon you to attack the validity of that subsequent contract? Isn't it incumbent upon you to show that the corporation had no authority in the first instance, or if they did have that authority, that the contract was without consideration and void and a legal fraud on the stockholders of the corporation.

(Argument by Mr. STONEMAN.)

By the COURT.—Mr. Stoneman, this is a suit by the corporation. It is true that it is brought in the name of the stockholder because the corporation itself declined to bring the suit. Now, then, this corporation, the plaintiff in the suit, and the defendant corporation, on December 30th, 1913, had the right, did they not, all things being regular, to construe the contract of January 27th, 1912?

Was there anything to prevent them from construing that contract as between themselves, and having so construed it between themselves to mean that the plaintiff, the Trust Company, owed the defendant, the bank, a certain sum of money, isn't that binding, not only upon the Union Bank & Trust Company, but if lawfully made and without fraud on its part or upon the part of the defendant corporation, binding [133—39] upon all of its stockholders. Had they not the right to construe that contract as it was intended to be, as it was, or as they expected it to be. I am referring to the written contract of December 30th, 1913, which treats the contract of January 27th, 1912, as a security for debt and not as an absolute sale as the instrument itself seems to make it.

By Mr. STONEMAN.—Yes?

By the COURT.—Now, then, upon that, and without considering the question of whether contemporaneous with the contract of January 27th, 1913, there was a parol agreement between these parties, which they had the right, it seems to me, to recognize at the time they entered into the contract of December 30th, I say are you not bound by the construction which the corporation itself, for whom you sue, placed upon it?

By Mr. STONEMAN.—I do not believe so if it can be determined from the contracts that it was void for absolute want of consideration.

By the COURT.—Isn't that a defensive matter? You cannot presume there was a want of consideration, can you?

By Mr. STONEMAN.—Suppose, if your Honor please, that Mr. Henning told me that I owed him eight hundred sacks of grain, and under a misconception of the facts, I had paid him eight hundred sacks of grain and had turned them over to him, and it turned out afterwards that I didn't owe him but three hundred sacks of grain. Now, I certainly would have the right to sue Mr. Henning for that five hundred sacks. Now, if this board of directors, under the mistaken idea that they might construe the contract of January 27th so that an indebtedness was admitted to exist from the Union Bank to the Valley Bank of seventy-five or eight thousand dollars, executed a new contract, it would not mean that a stockholder was [134—40] bound by their mistake, providing that you could look to the contracts themselves and found that there could have existed no indebtedness. It is susceptible of only one construction. I say that this contract is a sale on its face, and there is, in the answer, no transaction between the Valley Bank and the Union Bank which could have given rise, between January, 1912, and December, 1913, any indebtedness between the Union Bank and the Valley Bank. Their dealings ceased on January 27th, 1912. Now, if the Union Bank, then, we speaking for the Union Bank, cannot go to the Valley Bank and say to the Valley Bank, "You have taken from us \$75,000 worth of assets which you have not any right to take," or according to the testimony here, something like \$33,000 worth: "You had no right to take it; there was no consideration for it."

We submit this contract for your consideration from which you can see that we do not owe it to you, and we want it back.”

By the COURT.—And you admit that it did not exist?

By Mr. STONEMAN.—If your Honor please, are we bound because we have admitted something which could not exist?

By the COURT.—You have admitted it by your contract of December 30th, have you not?

By Mr. STONEMAN.—I suppose we have in so far as there was any authority to admit it; I am speaking as the Union Bank and not as the stockholder.

By the COURT.—Now, then, if that be true, if you have admitted it, how can you ask the Court to assume that there was no consideration for that admission?

By Mr. STONEMAN.—Because we have come into court and shown the Court that there was a mistake and shown the Court that the consideration could not have existed with the [135—41] proof out of their own mouths. We think it is up to them to establish the validity of the parol contract, and when they attempt to do that, we submit the rule that they cannot introduce such evidence for the parol contract to qualify the terms of a written contract.

By the COURT.—Now, let us see. On December 30th, you say that you—I am reading from page 2 of exhibit one, you said that you were indebted—that you executed a note for \$164,000 on the 17th day of

May, 1913, and that there remains due upon this note approximately \$75,000.00.

(Discussion.)

By the COURT.—It seems to me from the discussion that was had when the demurrers were argued, or rather the motion to strike was argued, the construction and the opinion that I got at that time; from the reading of the contract originally entered into, the one of January 27th, 1912, that it might well be construed as the parties afterwards did construe it, that is to mean a security for a debt. It is most unusual for a person who buys property, notes and securities outright, to take one as a guarantee for them guaranteeing the purchaser against loss, and it seems to me, if this case were to proceed, that the defendant would be allowed to introduce [136—42] testimony to show what the real transaction or agreement was. But aside from that, I am of the opinion that in this case the plaintiff corporation, in entering into the contract of December 30th, 1913, as it had a right to do, recognized the transaction, the original transaction as a security for an indebtedness, and that the stockholders of the corporation, including the plaintiff who sues on its behalf, are bound by that contract, and under the state of the case, I feel compelled to grant the motion for judgment on behalf of the defendants, and there the motion will be sustained and judgment will be entered for the defendants.

By Mr. STONEMAN.—If your Honor please, we desire the record to show an exception on the part of the plaintiff to your Honor's ruling, and I am not

familiar whether a motion for appeal is required at this time or not.

By the COURT.—You may give notice at this time, if you desire.

By Mr. STONEMAN.—And from the order granting the motion and from the judgment of your Honor directed to be entered, plaintiff now gives a notice of appeal to the Circuit Court of Appeals for the Ninth Circuit.

WHEREFORE, complainant prays that said decree be reversed and the District Court be instructed to enter such decree as is prayed for by said bill of complaint conformably with the rules of practice and procedure of this Honorable Court.

GEORGE J. STONEMAN,

E. J. HENNING,

REESE M. LING.

C. A. McGEE,

A. J. MORGANSTERN.

E. E. HENDEE.

Dated at Phoenix, Arizona, September 20th, 1915.
[137]

[Endorsed]: No. E.—20. In the United States District Court, for the District of Arizona. Western Underwriting & Mortgage Company, a Corporation, Complainant, vs. The Valley Bank of Phoenix, a Corporation, et al. Defendants. Assignment of Errors. Filed Sept. 20, 1915. George W. Lewis, Clerk. Service within by Copy. Admitted this 20th day of Sept. 1915. C. F. Ainsworth, Atty. Deft., Valley Bank of Phoenix.

[Endorsed]: No. 2675. United States Circuit Court of Appeals for the Ninth Circuit. Western Underwriting & Mortgage Company, a Corporation, Appellant, vs. The Valley Bank of Phoenix, a Corporation and The Union Bank & Trust Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed November 4, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.